92-1487
NO.

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1992

CLEO ALLEN BUTLER, ET AL.
PETITIONERS

VERSUS

JEROME T. MEDLEY, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

JAMES L. YATES, ESQ.
631 St. Charles Avenue
New Orleans, LA 70130

(504) 523-4497

DARLEEN M. JACOBS,
ESQ.
COUNSEL OF RECORD
BRIAN C. BECKWITH, ESQ.
DARLEEN M. JACOBS
(A PROFESSIONAL LAW
CORPORATION)
823 St. Louis Street
New Orleans, Louisiana
70112
(504) 522-3287 & 522-0155
Counsel for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

Whether La.R.S. 40:1299.42(B), which limits the tort recovery of a medical malpractice victim to $500,000 exclusive of future medical costs, violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Plaintiffs-Petitioners

Cleo Allen Butler, individually and for and on behalf of

Michelle Butler

Arlene Major, as custodian of Michelle Butler

Defendants-Respondents

Jerome T. Medley, M.D.

Warren P. McKenna, M.D.

Joseph P. Braud, M.D.

Louisiana Patient's Compensation Fund

Former Defendants Flint Goodridge Hospital and Sandra Viglia reached a settlement with petitioners and were dismissed from this action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

ARGUMENT 9

I. LA.R.S. 40:1299.42(B) SHOULD BE REVIEWED UNDER A HEIGHTENED STANDARD OF SCRUTINY 9

II. LA.R.S. 40:1299.42(B) IS UNCONSTITUTIONAL WHEN REVIEWED UNDER HEIGHTENED SCRUTINY 12

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 3, 12

STATUTES

42 U.S.C. § 12101(a)(7) 3, 11

42 U.S.C. § 12101(b)(4) 3, 12

42 U.S.C. § 12102(2) 4

42 U.S.C. §§ 12101-12213 10

La.R.S. 40.1299.44(C)(5) 6

La.R.S. 40:1299.42(B) 1, 6, 8, 9, 12, 16

CASES

Boyd v. Bulala,
877 F.2d 1191 (4th Cir. 1989) 10

Brannigan v. Usitalo,
587 A.2d 1232, 1236 (N.H. 1991) 14

Carson v. Maurer,
424 A.2d 825 (N.H. 1980) 14, 16

City of Cleburne, Texas v. Cleburne Living Center,
473 U.S. 432, 445-46, 105 S.Ct. 3249, 3257,
87 L.Ed.2d 313, 324 (1985) 11

Davis v. Omitowoju,
883 F.2d 1155 (3d Cir. 1989) 10

Fein v. Permanente Medical Group,

474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985) 12

Hoffman v. United States,
767 F.2d 1431 (9th Cir. 1985) 10

Katzenbach v. Morgan,
384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) 12

LaMark v. NME Hospitals, Inc.,
542 So.2d 753, 755-56 (La.App. 4th Cir. 1989),
writ denied, 551 So.2d 1334 (La. 1989) 13

Lucas v. United States,
807 F.2d 414 (5th Cir. 1986) 10

Lyng v. Castillo,
477 U.S. 635, 638, 106 S.Ct. 2727, 2729,
91 L.Ed.2d 527, 533 (1986) 11

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307, 313, 96 S.Ct. 2562, 2567,
49 L.Ed.2d 520, 525 (1976) 11

Moore v. Mobile Infirmary Association,
592 So.2d 156 (Ala. 1991) 14-16

Morris v. Savoy,
576 N.E.2d 765 (Ohio 1991) 15, 16

Sibley v. Board of Supervisors of Louisiana State University,
462 So.2d 149 (La. 1985),
on rehearing, 477 So.2d 1094 (La. 1985) 7-9

United States v. Carolene Products Co.,
304 U.S. 144, 153 n.4, 58 S.Ct. 778, 783 n.4,
82 L.Ed. 1234, 1241 n.4 (1938) 11

Williams v. Kushner,
524 So.2d 191 (La.App. 4th Cir. 1988),

aff'd as amended, 549 So.2d 294 (La. 1989) 7, 8, 13

OPINIONS BELOW

The judgment of the Civil District Court for the Parish of Orleans denying respondents' motion for summary judgment and the judgment of the Fourth Circuit Court of Appeal, State of Louisiana, granting writs and reversing the Civil District Court, will not be reported. The opinion of the Supreme Court of Louisiana affirming the Fourth Circuit Court of Appeal has not yet been reported. Copies of these judgments are contained in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on October 19, 1992. Petitioners' application for rehearing was denied on November 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the constitutionality of La.R.S. 40:1299.42(B) with respect to the equal protection clause of the Fourteenth Amendment of the United States Constitution. La.R.S. 40:1299.42(B) reads as follows:

> (1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost.
>
> (2) A health care provider qualified under this Part is not liable for an amount in excess of one

hundred thousand dollars plus interest thereon accruing after April 1, 1991, for all malpractice claims because of injuries to or death of any one patient.

(3)(a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40:1299.44(C).

(b) The total amounts paid in accordance with Paragraphs (2) and (3) of this Subsection shall not exceed the limitation as provided in Paragraph (1) of this Subsection.

The relevant portions of the Fourteenth Amendment read as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Also at issue is the effect of certain provisions contained in the Americans with Disabilities Act, as follows:

(a) Findings. The Congress finds that —

* * *

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . .

42 U.S.C. § 12101(a)(7).

(b) Purpose. It is the purpose of this Act —

* * *

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(4).

Disability. The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

STATEMENT OF THE CASE

This case is one in medical malpractice. On or about May 19, 1976, the minor child, Michelle Butler (then aged three) was admitted to Flint-Goodridge Hospital of Dillard University in New Orleans for a relatively minor surgical procedure, the excision of a granuloma from the child's right upper eyelid. This procedure was performed by respondents Drs. Medley and McKenna, who were assisted by an anesthesiologist, respondent Dr. Braud. Following the procedure, the physicians left the operating room before the patient was extubated. Extubation was attempted by a nurse-anesthesiologist, Sandra Viglia, without the assistance of a qualified anesthesiologist or other medical doctor, and without proper life-saving emergency support systems and monitoring devices. Upon extubation, Michelle Butler had a cardiac arrest and, due to the defendants' acts of malpractice, the child was rendered blind, deaf, paralyzed and mentally retarded. Michelle Butler is now a major.

The present suit was initiated following a medical review panel decision which found Dr. Braud to have been negligent. The requirement that medical malpractice claims must be presented to medical review panels prior to litigation is one aspect of Louisiana's Medical Malpractice Act. The issue presented in this petition is the constitutionality of another portion of the Act which limits the recovery for any medical malpractice claimant to $500,000, exclusive of future medical care, and limits the liability of qualified health care providers to $100,000 for any one malpractice claim. During the long pendency of this suit, numerous procedural events have occurred, only some of which are relevant to the issues presented for review by this Court. Two of the defendants, Flint Goodridge Hospital of Dillard University and its employee, nurse-anesthesiologist Sandra Viglia, were released from the suit in a compromise confected prior to Flint Goodridge's bankruptcy. This compromise was for the sum of $100,000. Petitioners specifically reserved all rights they

may have against respondents, Drs. McKenna, Medley and Braud, and their respective insurers.

Following the compromise with Flint Goodridge Hospital and Sandra Viglia, the Louisiana Patient's Compensation Fund conceded liability on behalf of the settling defendants, and confessed judgment in favor of petitioners in the amount of $400,000 in addition to interest and costs. Under the Medical Malpractice Act, the liability of a health care provider is considered admitted and established where the insurer has paid its policy limits of one hundred thousand dollars, or where the self-insured health care provider has paid one hundred thousand dollars. La.R.S. 40.1299.44(C)(5). Petitioners refused to accept this sum by way of compromise, and the funds were placed in the registry of the trial court. Petitioners refused to accept these funds because they did not wish to jeopardize recovery against the Patient's Compensation Fund for independent acts of malpractice by Drs. McKenna, Medley and Braud.

Respondents McKenna, Medley and Braud then filed motions for summary judgment on the basis of the $500,000 statutory limit on recovery for medical malpractice actions against qualified health care providers. Respondents argued that because they were qualified health care providers, they were entitled to the protection of the statutory recovery limit, and that a trial would be pointless since petitioners had received or been proffered the statutory maximum —$100,000 from the compromise with Flint Goodridge Hospital and Sandra Viglia, and $400,000 deposited by the Patient's Compensation Fund into the registry of the court.

Petitioners opposed the motions for summary judgment on the grounds that the $500,000 recovery limitation found in La.R.S. 40:1299.42(B) is unconstitutional. Petitioners' constitutional objections were included in the petition (demand) filed in the trial court. In particular, the Second Supplemental and Amending Petition states, "L.R.S. 40:1299.42(B)(1) and (2) violates the Equal Protection Clauses of the United States and Louisiana Constitutions and deprives the plaintiff's minor daughter [Michelle

Butler] of equal protection of the laws. . . ." Partly because the trial court was awaiting guidance from higher courts on the constitutionality of the recovery limitation, decision on the motions for summary judgment was delayed until 1991.

Initially, the trial court deferred action on the motions due to the pendency in the Supreme Court of Louisiana of *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149 (La. 1985), *on rehearing*, 477 So.2d 1094 (La. 1985). *Sibley* considered the constitutionality of the statute which limits the state's liability to $500,000.00 in any medical malpractice action. While a decision on the constitutionality of that statute might have provided some guidance with respect to the constitutionality of the recovery limitation for private qualified health care providers at issue in the present suit, the action in *Sibley* was remanded after rehearing without a determination of whether the statute was constitutional.

The summary judgment motions were again held in abeyance while the case of *Williams v. Kushner*, 524 So.2d 191 (La.App. 4th Cir. 1988), *aff'd as amended*, 549 So.2d 294 (La. 1989), was pending. The plaintiffs in *Williams* challenged the constitutionality of the same statute at issue in the present action, but the Supreme Court of Louisiana decided *Williams* without finding it necessary to reach the constitutional questions. Again, the trial court did not receive the guidance for which it was waiting.

The matter remained in abeyance until the original trial judge, the Honorable Thomas Early of the Civil District Court, Parish of Orleans, removed himself from the case. In his place, the Honorable Preston Hufft was appointed a judge ad hoc to conduct all further proceedings.

Following his appointment, Judge Hufft conducted a hearing on the motions for summary judgment. A judgment was rendered denying the motions for summary judgment on December 13, 1991. At no time prior to this judgment had there ever been a determination of the liability of Drs. McKenna, Medley or Braud; there had never been any evidentiary hearing or call for briefs or memoranda on the constitutional issues raised by petitioners. The only "consideration" of these claims

occurred as an adjunct to the hearing on the motions for summary judgment. In a well-reasoned opinion denying summary judgment, Judge Hufft determined that the moving respondents had not met their burden to show that they were entitled to summary judgment. He also found that the issue of the constitutionality of the $100,000 liability limitation for individual health care providers had not been resolved by either *Sibley* or *Williams*, and found that the constitutional issues were not ripe for adjudication prior to trial on the merits and a decision on liability and damages.

After being rebuffed in the trial court, respondents McKenna, Medley and Braud made application to the state Fourth Circuit Court of Appeal under its supervisory jurisdiction, seeking a reversal of the denial of summary judgment. Petitioners supported the trial court's decision that trial must be had on the substantive issues raised in the case, and that the constitutional issues could not be raised summarily. In the alternative, petitioners presented arguments on the constitutional issues themselves. On pages 4-11 of their Original Memorandum in Opposition to Writ Applications, petitioners argued that the medical malpractice damages cap violates the equal protection clauses of both the United States and Louisiana Constitutions.

In a decision rendered on February 3, 1992, the Fourth Circuit Court of Appeal exercised its supervisory jurisdiction and granted the respondents' writ application. A judgment was rendered in favor of respondents, dismissing all further proceedings against them. The Court of Appeal panel specifically held that all questions of the constitutionality of the recovery and liability limitations in La.R.S. 40:1299.42(B) were decided by that court in *Williams*, 524 So.2d 191 (La.App. 4th Cir. 1988), and that any further review of these constitutional issues must come from the Supreme Court of Louisiana. There was no petition for rehearing.

Petitioners then applied for writs with the Supreme Court of Louisiana to review the decision of the Fourth Circuit Court of Appeal. The writ application included

Specification of Error No. 4 which stated, "The Court of Appeal erred in not holding that the recovery limitations violate the Federal Constitutional guarantees of equal protection and due process of law." Writs were granted, and after briefing and argument the Supreme Court of Louisiana affirmed the judgment of the Court of Appeal in an opinion entered on October 19, 1992. The Court held that La.R.S. 40:1299.42(B) is valid and violates neither the Louisiana nor the United States Constitution. Petitioners' application for rehearing was denied on November 25, 1992.

ARGUMENT

I. LA.R.S. 40:1299.42(B) SHOULD BE REVIEWED UNDER A HEIGHTENED STANDARD OF SCRUTINY

Petitioners ask this Court to declare unconstitutional the statutory limits placed on the liability of qualified health care providers and on the total recovery available to victims in medical malpractice actions under La.R.S. 40:1299.42(B). This statutory scheme is fundamentally unfair to the citizens of Louisiana, all of whom are potential victims of negligent medical care, and is manifestly unfair to Michelle Butler, who has been denied just compensation for her grievous injuries, compensation she would have received if her injuries had been the result of a tort other than medical malpractice. The basic flaw in the liability and recovery limitations placed on medical malpractice actions is that they attempt to regulate malpractice insurance rates by placing the burden of inadequate compensation on the most severely injured victims who are most in need of the compensation and least able to bear the burden. The statutory scheme governing medical malpractice thereby violates the standards of justice incorporated into the United States Constitution.

By limiting medical malpractice recovery to $500,000, the Louisiana legislature has denied full recovery to the most severely injured victims who are most in need

of compensation. The Supreme Court of Louisiana has held that the medical malpractice damages cap classifies individuals because of their physical condition. *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985)(on rehearing). Michelle Butler's physical condition, her blindness, deafness, mental retardation and partial paralysis, requires compensation far in excess of $500,000, exclusive of medical costs. By limiting compensation, the legislature has disadvantaged Ms. Butler because of her physical condition, while allowing full recovery for those less severely injured who can be fairly compensated in an amount less than $500,000.

Such a classification based on physical condition is subject to special scrutiny under the express terms of the Louisiana Constitution. As will be discussed in the next section of this argument, the damages cap cannot withstand any form of heightened scrutiny. The Supreme Court of Louisiana maintained the validity of the cap only by employing the most cursory sort of rational basis review, ignoring the Louisiana Constitution and the Court's own precedents. While this Court cannot correct the errors below with respect to the Louisiana Constitution, petitioners submit that the United States Constitution also requires heightened scrutiny of statutes which classify citizens according to physical condition.

The United States Congress, as part of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, issued certain findings concerning persons with physical disabilities. The findings, if accepted by this Court, would require that Michelle Butler and others with physical disabilities be considered members of a "suspect class" for purposes of equal protection analysis. The Louisiana medical malpractice damages cap, because it classifies persons according to physical disability, would then be subject to strict scrutiny rather than the deferential rational basis review which federal appellate courts have employed in deciding equal protection challenges to caps in other states. *See Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989)(applied rational basis test in upholding Virgin Islands $250,000 limit on noneconomic damages, later amended to

include economic damages, in medical malpractice actions); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989)(applied rational basis test in upholding Virginia $750,000 limit, later amended to $1,000,000 limit, on recovery in medical malpractice actions); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986)(applied rational basis test in upholding Texas $500,000 limit on nonmedical damages in medical malpractice actions); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985)(applied rational basis test in upholding California $250,000 limit on noneconomic damages in medical malpractice actions).

Petitioners are aware that this Court has previously declined to rule that persons with disabilities display the characteristics of a suspect class. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 445-46, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313, 324 (1985). The characteristics of a suspect class include groups which may be defined as "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234, 1241 n.4 (1938); which exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527, 533 (1986); and which have experienced unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities, such a history of purposeful unequal treatment, or such a position of political powerlessness as to command extraordinary protection from the majoritarian political process, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520, 525 (1976). In the Americans with Disabilities Act, Congress has decided that these characteristics of a suspect class do, in fact, apply to persons with disabilities.

The Act includes a finding that:

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,

> based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . .

42 U.S.C. § 12101(a)(7). The term "disability" under the Act includes "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Malpractice victims such as Michelle Butler would certainly be "individuals with disabilities" under the Act. The designation of individuals with disabilities as a discrete and insular minority is clearly a call for heightened scrutiny under the federal scheme of equal protection analysis. These findings, promulgated after extensive hearings, review and analysis, are entitled to serious consideration by this Court. The findings are entitled to special deference in that they were promulgated under the powers granted to Congress in the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4); U.S. Const. amend. XIV, § 5. Congress should be granted some leeway on factual matters when it expands the reach of the equal protection guarantee of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

The effect of the Americans with Disabilities Act on the constitutionality of statutes which adversely affect individuals with disabilities is an unresolved issue which petitioners believe this Court should decide. The Act had not been enacted when this Court was previously presented with a constitutional challenge to a state medical malpractice damages cap. *Fein v. Permanente Medical Group*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985)(appeal from California Supreme Court decision upholding $250,000 limit on noneconomic damages dismissed for want of a substantial federal question). The passage of the Act has created a substantial federal question on the constitutionality of caps on damages. It should also be noted that the cap at issue in *Fein* applied only to noneconomic damages. The Louisiana cap applies to all

damages exclusive of future medical costs, and so a medical malpractice victim is not assured of recovering even all of her economic damages.

II. LA.R.S. 40:1299.42(B) IS UNCONSTITUTIONAL WHEN REVIEWED UNDER HEIGHTENED SCRUTINY

If any sort of heightened scrutiny is applied to La.R.S. 40:1299.42(B), the statute must be found unconstitutional. Whether it is the strict scrutiny standard requiring a statute to be necessary for the promotion of a compelling state interest, or the intermediate scrutiny standard requiring a substantial relationship to important government objectives, there is a balancing of interests. In marked contrast to the vital individual interest which has been excised by the medical malpractice recovery limitation, the proposed state interest is a speculative attempt at economic regulation.

The Louisiana legislature has decided that Michelle and other severely injured malpractice victims cannot receive full compensation because the payment of the compensation would cause too much disruption in the system of medical malpractice insurance which, in turn, would adversely affect the entire health care system. Petitioners ask this Court to hold that there is no connection between the limitation on medical malpractice damages and any benefit to the citizens of Louisiana sufficient to justify withholding compensation from precisely those victims who are most deserving.

The recovery limitation was intended to promote the availability of medical malpractice insurance at a reasonable cost, as well as to promote the availability and affordability of medical care for the citizens of Louisiana. *LaMark v. NME Hospitals, Inc.*, 542 So.2d 753, 755-56 (La.App. 4th Cir. 1989), *writ denied*, 551 So.2d 1334 (La. 1989); *Williams v. Kushner*, 524 So.2d 191, 195 (La.App. 4th Cir. 1988), *aff'd as amended*, 549 So.2d 294 (La. 1989). However, the connection between damage caps and the availability of either

malpractice insurance or medical care is based more on supposition than on facts. This view is corroborated by the fact that the existence of the recovery and liability limitations has not furthered the asserted purposes behind the limitations. Medical care is not more available or more affordable than it was prior to enactment of the limitations. As for malpractice insurance, an Insurance Commissioner for the State of Louisiana has testified that the malpractice insurance market had probably deteriorated since enactment of the damages cap.

Before the Supreme Court of Louisiana, the most detailed exposition of the supposed benefits of the recovery limitation was by the Louisiana Patients Compensation Fund. The brief below by the Fund set out testimony that some people felt the damages cap had "stabilized" the insurance market to the extent of slowing the number and severity of claims and that some people were able to obtain insurance who otherwise might have been without insurance. However, neither the Fund nor any of the other supporters of the recovery limitation set out the magnitude of these purported benefits with sufficient clarity to justify the conclusion that these benefits outweigh the manifest injustice of denying compensation to those who most clearly deserve it and need it.

The highest courts of other states have analyzed the interests at stake and concluded that limitations on recovery in medical malpractice actions are not justified. The New Hampshire Supreme Court has found a balancing test to be appropriate for an intermediate level of equal protection analysis. *Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991), *citing*, *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). In *Carson*, the New Hampshire court was called upon to decide the constitutionality of a statute which limited recovery for non-economic loss to $250,000 in medical malpractice actions. The court declared the statute invalid under the equal protection provisions of the New Hampshire Constitution. The court examined the interest of the individuals affected by the recovery limitation and stated, "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon

those persons who are most severely injured and therefore most in need of compensation." *Id.* at 837. In *Brannigan*, the court used the same reasoning to strike down a statute which limited damages recoverable for non-economic loss in any type of personal injury action to $875,000. 587 A.2d at 1233.

More recently, the Alabama Supreme Court has relied in part on the equal protection provisions of that state's constitution to invalidate a $400,000 limit on non-economic damages in medical malpractice cases. *Moore v. Mobile Infirmary Association*, 592 So.2d 156 (Ala. 1991). The court declared the proper standard of analysis to be whether the limit on damages was "reasonably related to the stated objective, and on whether the benefit sought to be bestowed upon society outweighs the detriment to private rights occasioned by the statute." 592 So.2d at 166. The cited objective and benefit of the limit on damages was to help control the increasing costs of health care and to insure its continued availability.

The court in *Moore* reviewed a series of reports published by the United States General Accounting Office concerning the effect on malpractice insurance of the various statutory reforms enacted in response to the escalation of insurance costs of the 1970's. 592 So.2d at 167-68. The court concluded that any connection between the statutory damages cap and the reduction of health care costs was, at best, indirect and remote because "the size of claims against health care providers represents but one among many elements composing the cost of malpractice premiums, which, in turn, represent only a small component of the total burden borne by health care consumers." 592 So.2d at 169. The statutory cap was declared invalid because the statute, "by balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, represents an unreasonable exercise of the police power." 592 So.2d at 170.

The Ohio Supreme Court has used the same line of reasoning set out in the New Hampshire and Alabama cases

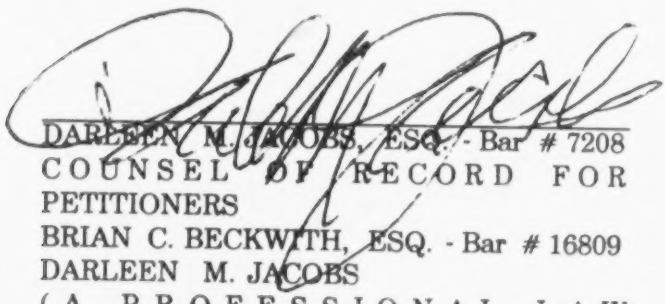
in order to strike down a $200,000 cap on general damages that may be awarded for medical malpractice. *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991). The Ohio court relied on that state's due process clause, but the standard of review was similar to an intermediate standard of equal protection analysis. The standard of review was described as being a determination of whether the challenged statute bears a real and substantial relationship to public health or welfare or whether it is unreasonable or arbitrary. 576 N.E.2d at 770. *Morris* states that the court could find no evidence of a substantial relationship, or even a rational connection, between the $200,000 cap and the control of malpractice insurance rates. In support of its conclusion, the court cited a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, which "found that the savings from various tort reforms, including a $250,000 cap on noneconomic damages, were 'marginal to nonexistent.'" 576 N.E.2d at 771. In addition, the $200,000 cap was held to be unreasonable and arbitrary because it imposed the cost of the intended benefit to society solely upon a class consisting of those most severely injured by medical malpractice. *Id.*

In the present case, as in *Carson*, *Moore* and *Morris*, the balance of interests is clearly in favor of the individual's real need for compensation and against the state's interest in experimenting with economic regulation in the field of medical malpractice insurance. The individual interest, Michelle Butler's interest, is in receiving just compensation for the catastrophic injury she has suffered. The idea of just compensation is central to the system of tort law which is the only source of recovery for the victims of medical malpractice. Michelle Butler has lost the ability to perceive the world and to communicate with others in the manner we take for granted. She has lost the ability to support herself through meaningful employment. Her interest in receiving full compensation is real, tangible and compelling. When a statute singles out those who have suffered most, those most in need of the state's protection, and denies them adequate compensation, that statute is contrary to elementary justice.

CONCLUSION

For the reasons stated above, petitioners ask that this Court grant a writ of certiorari in order to review the judgment of the Supreme Court of Louisiana in this action. La.R.S. 40:1299.42(B) discriminates on the basis of physical disability by denying full compensation to the most severely injured medical malpractice victims. The statute thereby violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. Should this petition for a writ of certiorari be granted, petitioners ask that the statute be declared unconstitutional and that this action be remanded for further proceedings so that Michelle Butler may receive just compensation for her injuries.

Respectfully submitted,



DARLEEN M. JACOBS, ESQ. - Bar # 7208
COUNSEL OF RECORD FOR PETITIONERS
BRIAN C. BECKWITH, ESQ. - Bar # 16809
DARLEEN M. JACOBS
(A PROFESSIONAL LAW CORPORATION)
823 St. Louis Street
New Orleans, Louisiana 70112
(504) 522-3287 & 522-0155

OF COUNSEL:

JAMES L. YATES, ESQ. - # 19841
631 St. Charles Avenue
New Orleans, Louisiana 70130
(504) 523-4497

92-1487
NO.

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1992

CLEO ALLEN BUTLER, ET AL.
PETITIONERS

VERSUS

JEROME T. MEDLEY, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF LOUISIANA

APPENDIX TO PETITION

OF COUNSEL:

JAMES L. YATES, ESQ.
631 St. Charles Avenue
New Orleans, LA 70130

(504) 523-4497

DARLEEN M. JACOBS, ESQ.
COUNSEL OF RECORD
BRIAN C. BECKWITH, ESQ.
DARLEEN M. JACOBS
(A PROFESSIONAL LAW CORPORATION)
823 St. Louis Street
New Orleans, Louisiana 70112
(504) 522-3287 & 522-0155
Counsel for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX TO APPENDIX

		PAGE
1.	Civil District Court for the Parish of Orleans, State of Louisiana, Judgment dated December 13, 1991.	A-1
2.	Fourth Circuit Court of Appeal State of Louisiana, Judgment datedFebruary 3, 1992.	A-2
3.	Supreme Court of Louisiana, Judgment dated October 19, 1992.	A-5
4.	Dissent by Calogero, C.J., dated October 19, 1992.	A-16
5.	Dissent by Lemmon, J., dated October 19, 1992.	A-17
6.	Dissent by Dennis, J., dated November 10, 1992.	A-21
7.	Louisiana Supreme Court, denial of rehearing, dated November 25, 1992.	A-43

CIVIL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 81-19167 DIVISION "A"

CLEO A. BUTLER, ET AL

VERSUS

FLINT-GOODRIDGE HOSPITAL OF DILLARD UNIVERSITY, ET AL

JUDGMENT

There came on before the court Motions for Summary Judgment filed herein by Drs. Medley, McKenna and Braud.

This court considering the motions, rules as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment filed herein by Drs. Medley, McKenna and Braud are hereby denied.

New Orleans, Louisiana this 13th day of December, 1991.

/s/ Preston H. Hufft, Judge ad hoc

CLEO ALLEN BUTLER,	*	NO. 92-C-0062
ET AL	*	AND
VERSUS	*	NO. 92-C-0132
FLINT GOODRIDGE	*	COURT OF
HOSPITAL OF DILLARD	*	APPEAL
UNIVERSITY, ET AL	*	FOURTH
	*	CIRCUIT
	*	STATE OF
	*	LOUISIANA

* * * * * * * * * * * * * * * *

IN RE:	DR. JOSEPH P. BRAUD, JEROME T. MEDLEY, M.D. AND WARREN P. MCKENNA, JR., M.D.
APPLYING FOR:	SUPERVISORY WRIT
DIRECTED TO:	HONORABLE PRESTON H. HUFFT, JUDGE AD HOC, CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS DIVISION "A", C.D.C. #81-19167

WRIT GRANTED AND JUDGMENT REVERSED

Relators seek review of the district court's denial of their respective motions for summary judgment. We find that the district court erred in denying the motions.

Relators are doctors named as defendants in a medical malpractice action for damages allegedly suffered by Michelle Butler, a minor, as a result of a surgical procedure she underwent at Flint-Goodridge Hospital. It is undisputed that plaintiff, by virtue of a settlement with the hospital and the admission of liability on behalf of the Patient's Compensation Fund, has already recovered $500,000.00, the maximum amount permissible under the Malpractice Act, LSA-R.S. 40:1299.42(b). For this reason, the defendant doctors each brought motions for summary judgment asking that plaintiff's suit against them be dismissed, because, as a matter of law, no further recovery is allowed plaintiff. Plaintiff's opposition to the motions was predicated solely on the assertion that the statutory limit of R.S. 40:1299.42(B) is unconstitutional. The trial court denied the motions without written reasons.

There is no genuine issue of material fact to prevent summary judgment in this case. The sole issue is a legal one -- the constitutionality of the statute. This court considered the identical issue in *Williams v. Kushner*, 524 So.2d 191 (La. App. 4th Cir. 1988), in which we held that R.S. 40:1299(B) does not violate the Louisiana Constitution. That decision affirmed the judgment of the trial court. On certiorari, the Louisiana Supreme Court upheld the constitutionality of the $400,000.00 limitation on

recovery from the Patient's Compensation $100,000.00 limitation on recovery against each qualified health care provider. Williams v. Kushner, 549 So.2d 294 (La. 1989). The Court stated that this issue was not before it because the only qualified health care provider, the treating physician had been released with prejudice prior to trial after settling for $100,000.00.

With regard to the constitutionality of the statute, we are bound by our holding in Williams declaring it to be constitutional. This holding has not been reversed by the Supreme Court, and stands as the law in this circuit. We therefore reverse the decision of the trial court and order that the motions for summary judgment filed by relators be granted.

In so acting, we recognize that the Louisiana Supreme Court must ultimately decide the issue of constitutionality. Unlike Williams, plaintiff herein has specifically reserved her rights against the defendant doctors. Their motions for summary judgment have thus squarely placed the issue before the court.

New Orleans, Louisiana this 3rd day of February, 1992.

/s/ Judge Robert J. Klees

/s/ Judge Robert L. Lobrano

/s/ Judge Pro Tempore
Trevor Bryan

CLEO ALLEN BUTLER, Individually and for an on behalf of the Minor, MICHELLE BUTLER and ARLENE MAJOR as Custodian of the Minor, MICHELLE BUTLER,

versus

FLINT GOODRIDGE HOSPITAL OF DILLARD UNIVERSITY, JEROME T. MEDLEY, WARREN P. McKENNA, JR., M.D. SANDRA VIGLIA, JOSEPH BRAUD, M.D. AND SHERMAN BERNARD, In His Capacity as Commissioner of Insurance, et al

No. 92 CC 0559.

Supreme Court of Louisiana.

October 19, 1992.

Dissenting Opinion by Justice Dennis, November 10, 1992.

WATSON, Justice.

The issue presented is the constitutionality of Louisiana's $500,000 cap on general damages in a medical malpractice victim's suit against multiple defendants. LSA-R.S. 40:1299.42(B)(1).

FACTS

In May of 1976, a three year old child, Michelle Butler, had complications following eye surgery. After suffering cardiac arrest, she was rendered blind, paralyzed and retarded. Michelle's maternal grandmother, Arlene Major, was appointed tutrix. She and the minor's attorney released the Flint-Goodridge Hospital, a division of Dillard University, and its employee, Sandra Viglia Williams, a nurse-anesthetist, for $100,000. The minor's rights against other parties, including the Louisiana Patient's Compensation Fund, Dr. Jerome Medley, Dr. Warren McKenna, and Dr. Joseph Braud, were reserved. It is alleged that there is excess coverage on some or all of the other health care providers, but plaintiff's discovery was prohibited.

The trial court gave judgment against the Louisiana Patient's Compensation Fund for $400,000 and ordered the Fund to pay Michelle Butler's medical care and related expenses from April 27, 1990. Plaintiff was awarded $244,275 for past care. After tender of its $400,000 was refused, the Fund deposited that sum in the court registry.

Drs. Medley, McKenna and Braud filed a motion for summary judgment because Michelle had received the maximum $500,000 recovery allowed by LSA-R.S. 40:1299.42(B)(1). The trial court denied the motion. The court of appeal granted a writ and ordered that summary judgment be entered. This court granted a writ to review the ruling of the court of appeal.

LAW

The Louisiana Constitution mandates equal protection of the laws. Art.I, Sec. 3. It prohibits arbitrary, capricious or unreasonable discrimination because of physical condition. Art. I, Sections 3 and 12. Open courts must provide an adequate remedy, administered without partiality, for injury to persons and property. Art. I, Section 22.

(1) Imperfections in legislation are not grounds for judicial intervention unless they result in denial of constitutional rights. *James v. Strange,* 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); *Everett v. Goldman*, 359 So.2d 1256 (La. 1978). Consistent with most other state supreme courts, *Everett* held that medical malpractice legislation does not infringe upon fundamental rights. See, for example, *Condemarin v. University Hosp.* 775 P.2d 348 (Utah 1989). Also see *Tull v. United States,* 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) and *Boyd v. Bulala,* 877 F.2d 1191 (4th Cir. 1989). Two provisions of the Louisiana Act were approved in *Everett;* medical review panels and no demand for a dollar amount. Compare *Hoem v. State,* 756 P2d 780 (Wyo.1988), which held that medical review panels deny equal protection.

Sibley I, Sibley v. Board of Sup'rs of Louisiana,, 462 So.2d 149 (La. 1985), held that limiting medical malpractice awards to $500,000 per patient does not violate the equal protection and due process guarantees of the state and federal constitutions or the state constitutional

guarantee of access to courts. A rehearing was granted and those issues were given further scrutiny in *Sibley II, Sibley v. Board of Sup'rs of Louisiana,*, 477 So.2d 1094 (La. 1985), which rejected the federal three-tier system of scrutiny. *Sibley II* decided that the physical condition discrimination in Louisiana's medical malpractice act, between those more and less severely injured, must further a legitimate state interest. *Sibley II* remanded, ordering that the state's interests be balanced against the discrimination to determine if the legislative classifications were arbitrary, capricious and unreasonable. The case was settled.

After a *Sibley II* analysis, the fourth circuit found the cap valid in *Williams v. Kushner,*, 524 So.2d 191 (La. App. 4th Cir. 1988). The evidence included testimony that some health care providers were "bare" of malpractice insurance before the passage of Act 817 of 1975. *Williams v. Kushner,* 549 So.2d 294 (La. 1989), amended and affirmed the court of appeal opinion without a definitive holding on the constitutional issue. *Williams* confirmed the validity of the $400,000 cap on general damages from the Fund but pretermitted the question of limiting payment by an individual health care provider to $100,000.

[2-4] Plaintiff's withdrawal of a doctor's $100,000 deposit in a court registry settled plaintiff's claim against the doctor. *Ewing v. Aubert,* 566 So.2d 616 (La. 1990). Payment of $100,000 by one qualified health care provider triggers the Fund's liability for excess damages. *Stuka v. Fleming,* 561 So.2d 1371 (La. 1990) *cert.*

denied, 498 U.S. --, 111 S.Ct. 513, 112 L.Ed.2d 525 (1990). The Fund cannot contest liability when there is a settlement for $100,000 by a health care provider before or after trial. *Koslowski v. Sanchez*, 576 So.2d 470 (La. 1991).

The fourth circuit again found the cap constitutional in *LaMark v. NME Hospitals, Inc.*, 542 So.2d 753 (La. App. 4th Cir. 1989) *writ denied*, 551 So.2d 1334 (La. 1989). Despite the lack of an express decision from this court, the United States Fifth Circuit inferred that the cap meets Louisiana's constitutional requirements. *Owen v. U.S.*, 935 F.2d 734 (5th Cir. 1991) *cert. denied*, -- U.S. --, 112 S.Ct. 870, 116 L.Ed.2d 775 (1992).

Under Louisiana's medical malpractice act, liability of multiple health care providers, to aggregate exceeding $100,000, does not inure to the victim but reduces the excess due from the Fund. LSA-R.S. 40:1299.42(B)(3)(a). The total amount paid from multiple health care providers shall not exceed $500,000. LSA-R.S. 40:1299(B)(1) and (3)(b).

Since the Louisiana Act does not affect fundamental rights, the constitutional test is whether its provisions are reasonably related to furthering general social interests. *Sibley II; Bazley v. Tortorich,* 397 So.2d 475 (La. 1981).

Other state courts of last resort have addressed these constitutional issues.

Lucas v. United States, 757 S.W.2d 687

(Tex 1988), answering a certified question from the United States Fifth Circuit, concluded that a $500,000 limitation on medical malpractice damages unconstitutionally limited open access to the Texas courts. The legislation failed to provide an adequate substitute, a societal quid pro quo. Moreover, reducing recovery of persons catastrophically injured by medical negligence was arbitrary, because it had no rational relationship to the state's interests.

Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), invalidated a $450,000 ceiling on noneconomic damages as an arbitrary cap denying constitutional access to the courts and the right to a jury trial.

Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990), decided that the $500,000 Texas cap on damages for wrongful death, a statutory remedy, was valid. The wrongful death cap was distinguished and severed from the common law remedy for malpractice. However, the statutory cap on wrongful death damages was interpreted to allow excess damages to a plaintiff recovering against more than one defendant.

Alabama's $400,000 limit on noneconomic damages recoverable against physicians violates the constitutional guarantee of equal protection. *Moore v. Mobile Infirmary Ass'n,* 592 So.2d 156 (Ala. 1991). Balancing the direct burden on catastrophically injured victims of medical malpractice against the indirect and speculative benefit to society, *Moore* found that any reduction of general health care costs was attenuated and

remote, while the burden on those most severely injured by medical malpractice was immense. Also, the limitation on damages for noneconomic losses was an impermissible burden on the inviolate right to trial by jury guaranteed by the Alabama Constitution.

Moore critizies a contrary opinion in *Etheridge v. Medical Center Hosp.*, 237 Va. 87, 376 S.E.2d 525 (1989). *Etheridge* was also distinguished, because the Virginia Constitution (like Louisiana's) does not guarantee an inviolate right to a civil jury trial.

Many of the cases from other jurisdictions invalidate damage caps because of a state constitution right to jury trial in civil cases. For example, Washington, Pennsylvania, Illinois, Ohio, Delaware and Florida have constitutional provisions which guarantee the right to civil jury trial, a provision lacking in the Louisiana constitution. See *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976); *Duren v. Suburban Comm'ty Hosp.*, 24 Ohio Misc.2d 25, 24 OBR 450, 495 N.E.2d 51 (1985); *Lacy v. Green*, 428 A.2d 1171 (Del.Super.1981); and *Smith, supra.* Compare the discussion of the Seventh Amendment's scope in *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989).

The New Hampshire Supreme Court invalidated an $875,000 cap on noneconomic personal injury loss as a violation of state equal

protection. *Brannigan v. Usitalo,*, 134 N.H. 50, 587 A.2d 1232 (1991). The court had earlier nullified a $250,000 cap on noneconomic damages for medical malpractice. *Carson v. Maurer,* 120 N.H. 925, 424 A.2d 825 (1980).

Morris vs. Savoy, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991), held that a $200,000 cap on general damages for medical malpractice was unconstitutional on due process grounds. There was no evidence of a rational connection between excess awards and malpractice insurance rates and therefore no real and substantial relationship to public welfare. In addition, the statute was found to be unreasonable and arbitrary by imposing the cost of any benefit to the public upon a class consisting of those most severely injured by medical malpractice.

In answer to a certified question, the Supreme Court of Kansas decided that a $250,000 statutory cap on noneconomic tort damages did not violate the right to jury trial or due process, because there was a legislative quid pro quo. *Samsel v. Wheeler Transport Services,* 246 Kan. 336, 789 P.2d 541 (1990) (overruled on other grounds in *Blair,* infra). Kansas constitutionally elminiated vicarious liability for medical malpractice by providing an adequate substitute remedy, and assured fund of $3,200,00 for payment of damages. *Bair v. Peck,* 248 Kan. 824, 811 P.2d (1991).

West Virginia upheld a one million dollar medical malpractice cap on noneconomic loss. *Robinson v. Charleston Area Med. Center, Inc.,*

186 W.Va. 720, 414 S.E.2d 877 (1991). *Robinson* applied its cap to the aggregated claims of a child and his parents, thereby eliminating recovery by the parents, secondary claimants. This interpretation accords with the language of the Louisiana statute, which applies the cap per patient.

Maryland caps noneconomic personal injury damages at $350,000. *Murphy v. Edmonds,* 325 Md. 342, 601 A.2d 102 (1992).

Indiana's $500,000 medical malpractice cap on damages was declared unconstitutional in *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980). Also see *Cha v. Warnick,* 476 N.E.2d 109 (Ind. 1985) *cert. denied,*, 474 U.S. 920, 106 S.Ct. 249, 88 L.Ed.2d 257 (1985). Both Indiana and Louisiana have provided the alternative remedy of a patient's compensation fund. However, unlike Louisiana, Indiana has made no provision for payment of full medical care and related benefits to medical malpractice victims. See LSA-R.S. 40:1299.43(A)(1) and (3). *Arneson v. Olson,* 270 N.W.2d 125 (N.D.1978) noted that North Dakota's $300,000 cap might prevent some malpractice victims from recovering all their medical expenses.

In many states, the problem of uninsured physicians, unable or unwilling to buy insurance, resulted in statutes mandating coverage. See, for example, the statutes declared constitutional in *McCoy v. Com., Bd. of Medical Ed. & Licensure,* 37 Pa., Commw. 530, 391 A.2d 723 (1978); *Kansas*

ex rel Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221 (1978); and *Jones v. State Board of Medicine,* 97 Idaho 859, 555 P.2d 399 (1976) *cert. denied,* 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977). Compare *McGuffey v. Hall,* 557 S.W.2d 401 (Ky. 1977), which found a denial of equal protection. Participation in Louisiana's medical malpractice insurance does make insurance available to "qualified risks" unable to obtain private insurance. LSA-R.S. 40:1299.46. Compare the mandatory physician funding for birth-related neurological injuries established in Virginia. *King v. Neurological Injury Comp. Program,* 242 Va. 404, 410 S.E.2d 656 (1991).

CONCLUSION

[5] This court decided two threshold issues in Williams v. Kushner, 549 So.2d 294 (La. 1989). The liability of the settling health care provider is moot, and limitation of Fund's liability to $400,000 is constitutional. We now hold that the $500,000 cap on medical malpractice judgments is also constitutional.

Although a subject of debate, the existence

of a medical malpractice insurance crisis was widely acknowledged when Louisiana's Medical Malpractice Act of 1975 was passed. See *50 Tulane Law Review 655 (1976) and Medical Malpractice* by Louisell and Williams, vol. 2 Section 20.07 (1990). It is undisputed that the severable provisions of the Louisiana Act were a legislative response to the perceived "crisis". *Everett.* The Medical Malpractice Act does not affect fundamental rights. *Everett.*

The statutory cap on medical malpractice judgments in excess of $500,000 distinguishes between classes of persons according to their physical condition. One group, those with injuries evaluated below $500,000, are fully compensated. The other group of malpractice victims, those with damages above $500,000 are fully compensated only for their medical expenses and related benefits. The question is whether that discrimination is arbitrary, capricious and unreasonable. *Sibley II.*

As an offset to the Act's $500,000 limitation, Louisiana now offers those most severely injured by medical malpractice three benefits: (1) greater likelihood that the offending physician or other health care provider has malpractice insurance; (2) greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits. Compensation and full medical care for those grossly injured by medical malpractice are legitimate social interests, which are furthered by the malpractice legislation. The discrimination in the Act against those with excessive injuries is accompanied by a quid pro puo: a reasonable alternative remedy has been provided. See

Bazley. Since the legislature's statutory solution to the medical malpractice problem furthers the state purpose of compensating victims, it is not constitutionally infirm.

Overall, the Louisiana Medical Malpractice Act represents a reasonable but imperfect balance between the rights of victims and those of health care providers. It does not violate the state or federal constitutions.

For the foregoing reasons, the judgment of the court of appeal is affirmed.

AFFIRMED.

CALOGERO, Chief Justice, dissenting.

The case presents the need, for the first time, for this Court to determine whether Louisiana's $500,000 cap on damages in a medical malpractice suit violates Art. I, Sec. 8 of the 1974 Louisiana Constitution. That provision bars unreasonable discrimination against any person because of, among other characteristics, physical condition. Only the medical patient most egregiously injured and disabled suffers the indignity and injustice of having limited in court the damages which the law affords all other medical negligence victims. This statutory limit on recovery is blatant discrimination which cannot survive the close scrutiny which our law requires. Defenders of the statute have not on this record convinced me that this discriminatory treatment of the most disadvantaged victims of medical negligence should alone, properly and necessarily, bear the brunt of an asserted "crisis" in the medical industry. In my opinion this discrimination is arbitrary, capricious and unreasonable and does not substantially further a

state purpose shown to be both appropriate and based on a convincing reality.

For Louisiana constitutional reasons I would join the other states which have declared unconstitutional similar medical malpractice cap statutes. *See Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *Carson v. Mauer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D.1978); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976); *Kansas Malpractice Victims v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988).

LEMMON, Justice, dissenting.

As I stated in dissent on the original hearing in *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149 (La. 1985), the $500,000 limitation on recovery violates the equal protection of the laws constitutionally guaranteed to the most severely injured medical malpractice victims.(See Footnote 1 below).

This court has previously validated other sections of the Medical Malpractice Act of 1975. In *Everett v. Goldman*, 359 So.2d 1256 (La. 1978) this court upheld the constitutionality of the requirement of initial submission of claims to Medical Review Panels. In *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986), this court upheld the constitutionality of the three-year preemptive period on medical malpractice actions. Each section of the Act, however, may be subject to different constitutional challenges. Both the

Everett and *Crier* decisions involved categories distinguishing medical malpractice victims from other tort victims generally. (See Footnote 2 below). But neither *Everett* nor *Crier* involved a category distinguishing between members of a narrow category of tort victims (those injured by medical malpractice) on the basis of physical condition.

Limiting the recovery of a few catastrophically injured medical malpractice victims, while allowing full recovery to the many lesser injured victims of the same tort, did not substantially further any appropriate state interest in dealing with a perceived or actual medical malpractice insurance crisis in 1975. Therefore, the legislative classification, discriminating on the basis of physical condition against a small category of tort victims, violated the equal protection of the laws guaranteed by the Louisiana Constitution.

Benefit to the public may be a rational basis for a discriminatory classification, but the more speculative and remote the benefit, the more arbitrary, is the discrimination. There was no evidence in this record of empirical data in 1975 which even suggested that awards in excess of $500,000 contributed in any way to high costs or low availability of health care. Research of appellate decisions reported in the ten-year period between January 1, 1973 and December 31, 1982 (the period during which malpractice actions arising in 1975 and in the immediately preceding years might be expected to reach the appellate courts) reveals no cases in which damages in a medical malpractice case had exceeded $500,000. Although other cases were probably compromised,

the total absence of reported appellate decisions in the time frame pertinent to the enactment of the cap in 1975 indicates that awards exceeding $500,000 were not such a problem in 1975 that limiting such awards was a rational means of lowering health care costs. (See Footnote 3 below). Any advantage that might reasonably have been expected in 1975 to inure to the public in reduced health care costs and increased health care availability from the denial of full recovery to a small group of malpractice victims was extremely speculative, especially when considered in comparison to the enormous deprivation of the rights of the victims.

Footnotes:

1. The majority erroneously refers to the limitation as a "cap on general damages." La. Rev. Stat. 40:1299.42B limits a medical malpractice victim's total recovery to $500,000 exclusive of the cost of future medical care and related benefits. Perhaps a statutory cap that excluded lost wages and damages for impaired earning capacity from the cap (as well as all medical costs) might more reasonably be deemed to significantly further an appropriate governmental interest. But as an example of a draconian result under the present law, a widower with several young children who earned $125,000 a year before being totally disabled by medical malpractice

would suffer a loss of wages which exhausts the limits of his recovery by the time of trial four years after the tort and would receive no general damages whatsoever (not to mention the total denial of any replacement wages for the rest of his work life expectancy.)

2. The *Everett* categories were validated on the basis of the need for a means of culling out frivolous cases because of the enormous cost of this type of litigation. The *Crier* decision approved a preemptive period, which overrode the discovery rule available in other tort cases, on the basis of the particular need in this type of case for limiting the "long tail" of liability caused by the discovery rule and the resulting impact on medical malpractice liability insurance and the cost and availability of health care.

3. After the Medical Malpractice Act was adopted in 1975, the first certiorari application (a few months before the application in *Sibley)* involving the cap was in *Williams v. Lallie Kemp Charity Hospital,* 428 So.2d 1000 (La. App. 1st Cir.) *cert. denied*, 434 So.2d 1093 (La. 1983).

DENNIS, Justice, dissenting.

I respectfully dissent. A rehearing should be granted, if not to reverse the majority'sdecision, at least to control the damage to the law done by its opinion.

The majority opinion pays lip service to Art. I Section 3 of our constitution and this court's interpretation of it in *Sibley v. Board of Supervisors*, 477 So.2d 1094 (La. 1985), but quickly degenerates into a hodge podge of ideas incongruous with those principles. For example, "fundamental right" and "rational relationship" are theorems borrowed from the federal three tiered system of equal protection scrutiny, which this court soundly rejected in *Sibley*, and "societal quid pro quo" is a specious notice emphatically cast-off by courts properly applying the "quid pro quo" or "reasonable just substitute" approach. The majority's reasoning is further flawed by its ambiguous language which suggests that the medical malpractice statute allows a severely injured victim to obtain reparation in the form of a money judgment for "all medical care and related benefits." In fact, the statue disallows a money judgment in excess of the $500,000 ceiling for any element of damage. A victim is relegated to a quasi-administrative proceeding in order to collect, on a claims-made basis, medical expenses and related benefits in excess of the ceiling. Even then, the victim may be subjected to medical exams and denied his claim by the patients compensation fund. Because of its confused analysis, the majority mistakenly based its entire decision on an illusory quid pro quo and never examined the evidence to see whether the proponents carried their burden of proof as required by the

intermediate scrutiny standard adopted by *Sibley*. For the same reason, my colleagues overlooked or disregarded recent government and foundation studies indicating that medical malpractice damage caps and other medical to reforms have failed to curb insurance costs or to further other legislative objectives.

The damage cap should have been declared unconstitutional under either of the two approaches to which the majority avowed allegiance in words but not in practice. Under a correct application of the heightened equal protection scrutiny standard adopted by this court in *Sibley*, the proponents of the damage cap failed to carry their burden of proving that the cap measurably furthers the asserted state purpose of restraining insurance costs and fostering medical care. Under the quid pro quo or reasonable just substitute analysis, the most severely injured malpractice victims have been required to give up their right to reparation in the form of a money judgment for more than $500,000, without receiving any reasonable substitute therefor, and without any countervailing sacrifice by health care provider defendants or less severely damaged victims.

Because the majority opinion has no clear or consistent rationale and affords no reliable basis for predicting future decisions, it should be clarified even if the result is not changed As it stands, the opinion confuses our state constitutional law and threatens to nullify the express guarantees of heightened equal protection for handicapped persons, women, illegitimate children, cultural groups such as Acadians, and other classes which our state constitution seeks to afford enhanced protection

from governmental discrimination. Furthermore, the majority opinion could have far reaching harmful effects on our tort law in general, for my colleagues have set us on a course toward sweeping indiscriminate approval of all other statutory damage caps and immunity laws.

Article I, Section 3 of the 1974 Louisiana Constitution, the Declaration of Right to Individual Dignity, provides: "No person shall been denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

In *Sibley v. Board of Supervisors*, 477 So.2d 1094 (La. 1985) this court held that under Article I, Section 3: "(1) the federal multilevel system is not an appropriate model for interpreting and applying the protection of equal laws pledged by our state constitution; (2) when a law classifying individuals on the basis of physical condition is attacked, the proponent of the legislation must show that the law does not arbitrarily, capriciously, or unreasonably discriminate against the disadvantaged class by demonstrating that the legislative classification substantially furthers a legitimate state objective." *Id.* at 1104.

Under this standard, when scrutinizing a law classifying individuals on the basis of

physical condition, the court must initially determine if there is a legitimate legislative purpose that could be served by the challenged classification. If such a legitimate objective is lacking, the law fails and further inquiry is unnecessary. If a legitimate government interest can be postulated, the court must then engage in a further analysis to determine whether the classification operates in a constitutional manner. This process involves examination of the legislative means, as well as the postulated ends of the statue to which the means are directed. Furthermore, this standard requires that the state or the proponent of the legislation bear the burden of showing with factual data that the classification substantially furthers the postulated goal of the legislation. See Nowak & Rotunda, Treatise on Constitutional Law, Substance and Procedure, Second Edition, Section 8.3 (1992).

In *Sibley*, this court also held that the medical malpractice act discriminates between two classifications of malpractice victims based on their physical condition, viz., (1) victims whose judgments under general tort law would exceed $500,000 because of the catastrophic nature of their disabilities and injuries, but whose money judgments are limited to this amount by the act; and (2) all other victims, who are permitted full reparation under general delictual law for their less severe disabilities and injuries by money judgments. *Sibley*, 477 So.2d at 1104. This court in *Sibley* remanded the case to allow the proponents of the classification to attempt to overcome the presumption of its unconstitutionality, but did not engage in a discussion of all of the aspects and ramifications of the statute in detail. In the present case, the

majority acknowledges the discriminatory classifications based on physical condition but suggests, perhaps, that the harsh effects of the classification are softened because the statue does not impose a ceiling or cap on damages related to medical expenses and related benefits. Unfortunately, the works of the state do not seem to support this humane view, and my colleagues do not make it absolutely clear that they will adhere to it as their own.

As I read the medical malpractice act, it absolutely bars a victim from obtaining a final or definitive judgment for the payment of money in excess of $500,000 against qualified health care providers and the patients" compensation fund. Although the act establishes a quasi-administrative procedure for the payment of medical expenses and related benefits in excess of this amount, the victim must submit periodic claims, apparently for expenses actually incurred, for the patients' compensation fund's approval or disapproval, and may be compelled to submit to medical examination from time to time.

In malpractice actions covered by the act, the trier of fact must make a finding or "recitation that the patient is or is not in need of future medical care and related benefits and the amount thereof." La. R.S. 40: 1299.43 A(1) & (2). If the total amount that the victim would be entitled to recover under general tort law exceeds the ceiling of $500,000, exclusive of the value of future medial care and related benefits, the cost of all future medical care and related benefits shall be paid in accordance with the quasi-administrative procedure. Id. subpar. (3) Under this procedure, once a judgment is entered in

favor of a patient found to be in need of future medical care or related benefits "and continuing as long as medical or surgical attention is reasonably necessary, the patient may make a claim to the patients compensation fund through the office of the attorney general for all future medical care and related benefits..." Id. (B)(2). The trial court has continuing jurisdiction of the case. Id. (E)(1). The patients compensation fund may have the patient examined by a physician of its choice from time to time "for the purposes of determining the patient's continued need of future medical care and related benefits"> Id. (G)

When the Article I, Section 3 standard is correctly applied in the present case, it is clear that while the defendants may have advanced hypothetically a legitimate statutory purpose for the cap, they manifestly have failed to carry their burden of proving that the $500,000 limitation of damages substantially furthers this purpose in reality. The legitimate objective they postulated is twofold: (1) to reduce or stabilize medical malpractice insurance rates and (2) to assure the availability of affordable medical services to the public. On the record presented for our review, however, the proponents of the damage cap simply have not shown that it has caused insurance rates to be their reduced or stabilized or that a removal of the cap would cause rates to increase. Similarly, they have failed to prove with factual data that the cap has affected the availability of affordable medical services or that its absence would do so adversely in the future. "Physical condition" was included in the specific categories afforded heightened scrutiny and protection under Article I, Section 3 in order to prevent a legislative classification

disadvantaging handicapped, crippled and catastrophically injured persons unless the champions of the classification proved that it substantially furthers a legitimate state purpose. *Sibley*, 477 So.2d at 1109. Because the proponents of the $500,000 cap have failed to prove that it is so justified it should be declared unconstitutional.

Like a ship in the night, with only a look and a nod in passing, the majority barely acknowledges Article I, Section 3 of our state constitution and this court's interpretation of it in *Sibley* while pursuing a hithertofore uncharted course. Indeed, if my colleagues meant to follow our previous interpretation of state constitutional law, as their citations indicate, they certainly fouled up the navigation. First, they repeatedly declare that the right involved here is not "fundamental" despite the fact that this classification is foreign to our state right of individual dignity. Article I, section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) when the law classifies individuals by race or religious beliefs, it must be repudiated absolutely; (2) when the statue classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification substantially furthers a legitimate purpose; and (3) when the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate purpose. *Sibley*, 477 So.2d at 1107. Second, the majority fails to notice that the burden of proving

that a classification based on physical condition is on its proponent, not upon the individual discriminated against, because that classification is presumed to be invalid until shown otherwise. Third, they indiscriminately cite and rely on cases that have nothing to do with classifications based on physical condition or Article I, Section 3, such as *Everett v. Goldman* and *Bazley v. Tortorich*. Fourth, because of their confusion on the foregoing points, my colleagues in the majority fail to even identify the state purpose which the proponents must prove is furthered by the classification, i.e., improved insurance rates and medical services, or bother to analyze the evidence to see if the proponents of the discrimination carried their burden.

As a result, the majority unintentionally winds up applying a standard very similar to the federal "minimal scrutiny" or "rational relationship" test that the delegates and the electorate sought to replace with Article I, Section 3 of our state constitution. Under the federal test, statutory classifications will not be declared invalid "if any state of facts reasonably may be conceived to justify [them]". *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). Also, the court using minimal scrutiny is to give the greatest amount of deference to the legislature, as the constitutionality of the provision is presumed. The burden of proof rests on the individual to show that no rational basis exists. Note, Equal Protection and Medical Malpractice Damage Caps, 28 Idaho L. Rev. 396, 404 (1991-92). To some scholars, this analysis is really a predetermined ruling and "minimal" is really no scrutiny at all:

> For example, it would be 'rational' in this sense to burn down a barn to kill a rat. Further, courts will not allow an empirically based challenge to undo a legislative classification. Even if dubious on empirical grounds, the legislation will be sustained if the legislative judgment was logically plausible. It is therefore unsurprising that nearly all legislative classifications have been sustained when courts apply this standard." Bovbjerg, Sloan and Blumstein, Valuin Life and Limb in Tort: Scheduling 'Pain and Suffering.'" 83 Nw.L.Rev. 908, 970 (1989) (Footnotes omitted)

The test for classifications based on physical condition, birth, sex, culture, inter alia, under Article I, Section 3 was intended to be more like the United States Supreme Court's "intermediate scrutiny" that falls between "strict scrutiny" and "minimal scrutiny" and requires that the classification be "substantially related to a legitimate state interest." See *Mills v. Habluetzel*, 456 U.S. 91, 99, 102 S.Ct. 1549, 1554, 71 L.Ed.2d 770 (1982). Although the Supreme Court thus far has reserved this test mostly for cases involving gender discrimination, *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), or classifications based on illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978), Article I, Section 3, expands these "quasi-suspect classifications" to include those based on physical condition, age, culture, political ideas, or affiliations. The majority, in the present case at least, reads the classifications earmarked for heightened or "intermediate scrutiny" out of Article I, Section 3 of the Louisiana Constitution, despite the clear

intention of the delegates and the people to write in enhanced protections and elevated examination of such classifications for women, handicapped persons, culture groups, illegitimate and other persons who might suffer discriminations by unjustifiable classifications.

The majority opinion overlooks or disregards several empirical studies done in states other than Louisiana indicating that medical malpractice damage caps, either singly or in connection with other tort law modifications, have not had their intended effects upon malpractice insurance premiums or the availability of affordable medical services. General Accounting Office, Medical malpractice: Six State Case Study Shows Claims and Insurance Costs Still Rise Despite Reforms, HRD-87-21 (December 1986); Danzon, The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims, 48 Ohio state L.J. 413 (1987); Sloan, State Responses to the Medial Malpractice Insurance "Crisis" of the 1970's": An Empirical Assessment, 9 J. Health Politics, Policy, and Law 629 (1985); Zwier and Pirmattei, Who Knows Best About Damages: A Case for Courts' Rights, 93 Dick.L.Rev. 689 (1989). Even in Indiana, the state with the most stringent medical malpractice reforms and some of the elowest medical malpractice premiums, the effects of the cap itself have been found to be counterintuitive, and perhaps counterproductive. Indiana is the only state that has had a cap on all damages, including economic loss as well as pain and suffering, in place consistently since 1975. Yet its cap in actual practice operates as a floor, instead of a ceiling, encouraging large claims to "bump" up against the cap, increasing rather than depressing average claim severity

and paid out damages, and causing concerns about actuarial soundness, slow payment of claims, and other problems. Gronfein and Kinney, Controlling Large Malpractice Claims: The Unexpected Impacts of Damage Caps, 16 J. of Health, Politics, Policy and Law, 441 (Fall 1991); Bovbjerg, Lessons for Tort Reform from Indiana, Id. at 465. The long range effectiveness of the Indiana cap, therefore, appears to be in doubt. In effect, it creates a strict liability system which encourages and inflates most claims while exacerbating the harshness of its discrimination against the relatively few catastrophically disabled and injured victims.

In recent well-reasoned state equal protection decisions, other state courts have applied heightened scrutiny and concluded that damage caps were invalid under their state constitutions. In the present case, the majority missed the significance of this trend because it simply lumped together citations of state decisions of all kinds - not just equal protection cases - without any real analysis. Even when not specifically required by their state charters, many state courts have applied intermediate scrutiny in reaching their decisions. As the Alabama Supreme Court observed in *Moore v. Mobile Infirmary Association*, 592 So.2d 156, 170 (Ala. 1991), "[s]tate courts, in determining the scope of rights guaranteed by their own constitutions, are not compelled exactly to correlate their standards of review to the 'three-tiered' scrutiny employed by the federal courts and may, in fact, provide more protection for private rights than the United States constitution requires." Accordingly, the Alabama court applied its own form of elevated standard of review and concluded;

[T]he damages cap imposed ... and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote. Although there is evidence of a connection between damages caps and the size of malpractice claims filed, the size of claims is merely one among a host of factors bearing on the cost of malpractice insurance. Even more significantly, the costs of malpractice insurance ranks near the bottom of the list of expenses incurred by health care providers. Consequently, the size of claims against health care providers represents but one among many elements composing the cost of malpractice premiums, which, in turn; represent only a small component of the total burden borne by health care consumers.

By contrast, the burden imposed ... on the rights of individuals to receive compensation for serious injuries is direct and concrete. The hardship falls most heavily on those who are most severely maltreated and, thus, most deserving of relief. Unlike the less severely injured, who receive full and just compensation, the catastrophically injured victim of medical malpractice is denied any expectation of compensation beyond the statutory limit. Moreover, the statue operates to the advantage not only of negligent health care providers over other tortfeasors, but of those health care providers who are *most irresponsible*. *Id.* at 169 (citations omitted).

See also, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831, 836-37 (1980) ("[T]he test is whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation. (citations omitted). Whether the malpractice statue can be justified as a reasonable measure in furtherance of the public interest depends upon whether the restriction of private rights sought to be imposed is not so serious that it outweighs the benefits sought to be conferred upon the general public. *** It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991); *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1977).

The present case demonstrates clearly the impracticality of either the strict scrutiny or the rational relationship test. That is why an intermediate test of equal protection was established by Article I, Section 3 of our state constitution for the judicial review of statutory classifications based on physical condition and other quasi-suspect categories, as this court recognized in *Sibley v. Board of Supervisors*, 477 So.2d 1094 (La. 1985) (on rehearing). My colleagues acknowledge the heightened protection of the constitution against arbitrary discrimination through use of such classifications, and they cite *Sibley* with approval, even mouthing some of its words. But in the final analysis they quail and turn away, reverting to a rational relationship test, without seeing any need to offer an explanation for their crucial deviation. All of this suggests that they

may have acted irresolutely because of a lack of full understanding of the significant differences between the various equal protection tests and should be willing to reconsider this case in light of the proper test and the appropriate type of scrutiny.

A rehearing is also warranted because my colleagues have not fully understood the implications that this decision may have on our scrutiny of other statutory limitations of damages and grants of immunity. Other vested interest will be encouraged to seek special legislation granting them similar limitations of liability or damages if rational relationship is to be the only equal protection test applied. The legislature may feel free to enact damage caps routinely if the present case means that this court will apply only minimal scrutiny in reviewing every limitation of damage statute. Busy trial courts may have loath to undertake the arduous task of requiring proof that damage caps substantially further a legitimate state objective because this court today creates serious doubt that the constitution so requires. Moreover, the trial and appellate courts may interpret the majority's opinion as blanket approval of any damage cap law which the legislature attempts to justify with a plausible rote of crisis, such as La. R.S. 13:5106 purporting to cover the sate, state agencies and political subdivisions with a $500,000 damage cap. See also the proliferous body of immunity, no duty and limitation of liability statues covering everything from Mardi Gras parades to block safe houses, which may be affected by the present decision. La.R.S. 9:2791-2800.8. Ultimately, from the present decision, we may reap constitutional interpretations and a

floodtide of damage cap legislation that will cause massive incursions into our general tort law and ultimately divide all potential defendants into the "haves" and the "have nots", i.e. the state, state agencies, state subdivisions, and the special interest groups, with the benefit of cap protection, on the one hand, and the average citizens, without benefit of caps and obliged to pay all of their just debts, on the other.

The majority's attempt to perform a "quid pro quo" or "reasonably just substitute" analysis is almost as disappointing as its distortion of heightened or intermediate scrutiny into a mere rational relationship test. Some state courts have applied a quid pro quo analysis to conclude that a medical malpractice damage cap is unconstitutional as violative of the victim's sate constitutional right to access to courts. E.g., *Smith v. Department of Insurance*, 507 So.2d 1080, 1088 (Fla. 1987) ("'[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State ... the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be found.'") See also, *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Wright v. Central Du Page Hosp. Assn.*, 63 Ill.2d 313, 347 N.E.2d 736 (1976). One scholar has suggested that the quid pro quo analysis, similar

to that used in worker's compensation and nuclear accident compensation schemes, also should be applied as a part of or instead of intermediate scrutiny to require that medical malpractice compensation statues provide a "reasonably just substitute" for a patient's abridged common-law remedies. Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitution "Quid Pro Quo" Analysis To Safeguard Individual Liberties, 18 Harv.J. on Legislation 143 (1981). Although the united States Supreme Court has not expressly required that a reasonably just substitute be present in a statue abrogating or limiting common-law remedies, the court's discussions in worker's compensation and nuclear accident compensation cases have strongly endorsed substitute statutory benefits. *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *New York Central Railroad Co. v. White*, 243 U.S. 188, 201, 37 S.Ct. 247, 252, 61 L.Ed. 667 (1917). The rationales of these cases logically dictate that this quid pro quo should be present even to satisfy the minimum rationality standard ore view. Because the semi-suspect class and quasi-fundamental rights threatened by medical malpractice compensation schemes support a stricter review standard, the policy arguments supporting inclusion of a reasonably just substitute are especially applicable. Learner, supra at 200.

This is very similar to the view expressed by Chief Justice Dixon in his dissenting opinion in *Williams v. Kushner*, 549 So.2d 294, 804-312 (La. 1989). He interpreted Article I, Section 22 of our state constitution to require, in effect, that a reasonably just substitute be present in any

legislative act diminishing or abolishing for a "discrete category of tort victims" a remedy provided by general law. Id. at 310. Article I, Section 22 provides:

> All Courts shall be open, and every person shall have an *adequate remedy* by de process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights. (emphasis added)

Chief Justice Dixon maintained that the meaning of the guarantee that "every person shall have an adequate remedy" is based on "the accumulated human and legal experience expressed in our Civil Code ... [which] would not restrict the legislature's authority to define the nature of relief to be granted when a legally cognizable harm has occurred. *But where a cause of action has been recognized in the law, the measure of the remedy provided, in whatever form, must meet the constitutional mandate of adequacy.*" *Id.* at 311. When the "adequate remedy" guarantee is considered in reference to other constitutional provisions this interpretation is compelling. If a majoritarian legislative body were free to abrogate or diminish for minorities or particular individuals the rights and remedies provided for the majority by general law, without at least providing a reasonably just substitute, there could be no constitutional democracy under which government "is instituted to protect the rights of the individual," Art. I, Section 1, La. Const. 1974, including the right to substantive due process of law, Id. Art. I, Section 2, freedom from indignity and involuntary servitude, id. Section 3, and

other unenumerated rights retained by the individual citizens of the state. Id. Section 24. See also, id. Preamble.

The worker's compensation and nuclear compensation schemes indicate the essential elements of a constitutionally acceptable reasonably just substitute when an established remedy under general law is abrogated or substantially diminished for a particular class of citizens. Countervailing sacrifices are demanded from each party. In exchange for the limitations on the accident victim's remedy, a strict liability system guarantees a recovery by superseding the plaintiff's prior obligation to prove negligent conduct. A relatively simplified claims procedure significantly benefits the plaintiff by providing a prompt and efficient mechanism for damage recovery, thereby obviating for all parties the costs and long delays of ordinary negligence litigation. See Learner, supra at 202.

For example, the worker's compensation acts provided a quid pro quo in that the employer assumed a new liability without fault but was relieved of the prospect of large damage judgments, while the employee, whose monetary recovery was limited, was awarded compensation without regard to the employer's negligence. In other words, the employer was required to give up certain defenses and the employee was required to give up certain recoverable elements of damage of an ordinary negligence action. See *Wright v. Central DuPage Hosp. Assn.* 63 Ill.2d 313, 347 N.E.2d 736, 742 (1976).

In the Louisiana Medical Malpractice Act, however, the legislature placed a drastic limitation on the severely injured patient's ability to seek full reparation for his damage under general delictual law without requiring countervailing sacrifices by other parties. The act

abolished no delictual defenses, nor did it reduce in number or difficulty the essential elements the plaintiff must establish to recover for medical malpractice or lessen the plaintiff's evidentiary burden of proof. Nor was any reasonably just substitute or adequate remedy supplied in place of the recoverable elements of damage that the medically wrecked person is required to give up. In practice, the claims system has not been made simpler, speedier or less expensive. Meritorious claims are not handled more efficiently or paid more promptly. Nor does it appear that the damage cap or the system of which it is a part provide any greater deterrence to medical negligence or nonmeritorious claims. The elements of reciprocity traditionally associated with a valid quid pro quo or reasonably just substitute appear to be totally absent.

The majority erroneously assumes that a reasonably just substitute for the abrogation of victims' remedies for extra-cap damages has been provided by (1) the absence of a cap on medical expenses and related benefits; (2) an incentive for each physician to maintain $100,000 of malpractice insurance; (3) a solvent fund to cover an additional $400,000 of a physician's liability.

The majority is clearly incorrect in its apparent assumption that there is no ceiling or limitation on money judgments for future medical expenses or related benefits. The statute unquestionably bars a money judgment in excess of $500,000 for any element of damage, including medical expenses and related benefits. The victim is relegated to a quasi-administrative claims remedy and is subject to examination, evaluation and claim rejection at any time. If the victim's

future medical expense claims are not subject to an "air-tight" "cap", they nevertheless must pass through a "damper" under the control of the trial court and the patients compensation fund. Even if the majority's assumption is correct, its contention that the statute's failure to cap medical expenses and related benefits constitute a quid pro quo for the abridgement of victim's rights is illogical. The lack of a cap on medical expenses and related benefits provides a plaintiff with no new benefit and in no way makes up for the limitation imposed on all of his other damages. Therefore, the first "benefit" is nothing more than an illusion.

The next two "benefits" are specious. First, there is no proof in the record that the damage cap either stimulates the purchase of insurance or measurably improves the solvency of defendants. Second, even if it were assumed that these effects flow generally from the damage cap, there is no proof that they help make up for its harsh effects upon severely injured "capped" victims in particular. These presumed benefits extend to the public and all medical malpractice claimants, whereas only the few catastrophically injured malpractice victims are forced to bear the cost of a ceiling on their right to reparation in the form of a money judgment. The alleged benefits relative to such victims' extreme burdens are so disproportionate as to be virtually irrelevant. Third, the legitimate ends of promoting insurance and solvency can be furthered more effectively through other means without such harsh, discriminatory effects upon the most severely injured of all medical malpractice victims. Indeed, the "benefits" cited by the majority resemble those

involved in the concept of a "societal quid pro quo" which has been emphatically rejected as providing no just recompense for the abridgement of individual plaintiffs' remedies. See *Wright v. Central Du Page Hospital Assn.*, supra, 347 N.E.2d at 742; Learner, supra 205.

Finally, because of my colleagues' over estimation of the remedy afforded by the act for a victim's future medical expenses and related benefits, the majority tends to minimize the harshness of the damage cap's effect on a victim because of his restricted reparation for "noneconomic" damage. "Noneconomic", "moral", "nonpecuniary" and "extra-patrimonial" damages include humiliation, embarassment, pain and suffering, shock loss of enjoyment and companionship, fear, anxiety, indignity, loss of consortium and grief. See Stone, Tort Doctrine Section 14, and authorities cited therein. For many plaintiffs, a limitation upon those kinds of damages alone can have extremely harsh effects. For a child such as Michelle Butler, who from the age of three has suffered blindness, paralysis and retardation, the only compensation for a lifetime without play, colors, visual arts, reading, and higher education comes from noneconomic damages. Similarly, a person who has been hideously disfigured receives only noneconomic damages to ameliorate the resulting humiliation and embarrassment. As with all plaintiffs, noneconomic damages proved the malpractice victim with the primary source of compensation for loss of physical capacity or reduced life expectancy.

Relatively few medical malpractice victims will be entitled to awards of $500,00 or more exclusive of medical expenses and related benefits. But the limitation upon damages in such cases tends to be harsh indeed. Most such recoveries occur in cases involving permanent, catastrophic damage to children, as in the present case and *Williams v. Kushner,* and to young, previously health adults. See *Sibley v. Board of Supervisors*.. When the limited recovery is spread out over the lifetime of a young person, it shrinks in comparison with the cumulative damage that the severely injured and disabled patient must suffer and edure until his or her death.

As in *Roberts v. Benoit,*, 603 So.2d 150 (La. 1992), a majority of this court has been blinded by a dazzling array of legal talent assembled by special interest groups opposing the single catastrophically injured and disabled tort victim. Unfortunately, whereas in *Roberts* the parties seeking special advantages to the detriment of the public succeeded only in causing limited damage to one area of tort law, in the present case the interest groups may have caused the court to do far-reaching harm to our state constitutional law as well as to many areas of our tort law in addition to medical malpractice. In order to prevent or minimize this damage, a rehearing should be granted.

SUPREME COURT OF LOUISIANA

On the 25th day of November, 1992, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

92-CC-0559 CLEO ALLEN BUTLER, ET AL v. FLINT GOODRIDGE HOSPITAL OF DILLARD UNIVERSITY, ET AL (Parish of Orleans)

Rehearing denied.

CALOGERO, C.J., DENNIS, J., LEMMON, J. - would grant rehearing.

Supreme Court, U.S.
FILED
APR 9 1993

NO. 92-1487

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLEO ALLEN BUTLER ET AL.
PETITIONERS

VERSUS

JEROME T. MEDLEY, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

BRUCE ARNE CRANNER
COUNSEL OF RECORD
C.T. WILLIAMS, JR.
J. ELLIOTT BAKER
BLUE, WILLIAMS & BUCKLEY, L.L.P
3421 N. Causeway Blvd., Ninth Floor
Metairie, LA 70002-3760
Telephone: (504) 831-4091
Counsel for Louisiana Patient's
Compensation Fund, Respondent

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Honorable Court should exercise its jurisdiction in this matter.

II. Whether La. R.S. §40:1299.42(B), which limits recovery in medical malpractice actions to $500,000 exclusive of medical costs, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

TABLE OF CONTENTS

CONTENTS PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE vi

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. This Court Should Not Exercise Its Jurisdiction Because The Petitioners' Arguments Regarding The Disabled Americans Act Were Not Timely Raised In The Court Below And Are Thus Not Properly Before This Court 4

II. This Court Should Not Exercise Its Jurisdiction Because The Petition For Writ of Certiorari Does Not Raise A Substantial Federal Question 5

A. A Federal Equal Protection Challenge To A State Statutory Limitation On Recovery In Medical Malpractice Actions Does Not Present A Substantial Federal Question 5

B. The Americans With Disabilities Act Does Not Create a Substantial Federal Question In This Case 6

III. La. R.S. §40:1299.42(B) Does Not Violate The Equal Protection Guarantees Of The Fourteenth Amendment 10

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI, cl. 2 12

U.S. Const. amend. X 12

U.S. Const. amend. XIV . . . . . i, 7, 9, 10, 12, 14, 16

U.S. Const. amend. XIV, §5 . . . . . 6, 8, 9, 10

La. Const. art. II, §2 12

La. Const. art III, §1 12

42 U.S.C.A. §§12101 et seq 4, 6

42 U.S.C.A. §12101(a)(7) 6

42 U.S.C.A. §12101(a)(8) 7

42 U.S.C.A. §12101(b)(4) 7

La. R.S. §40:1299.42(B) . . . . . i, 10, 17

JURISPRUDENCE

Banker's Life and Casualty v. Crenshaw,
486 U.S. 71, 108 S.Ct. 1645,
100 L.Ed.2d 62 (1988) 5

Board of Secondary and Elementary Education v. Nix, 347 So.2d 147, (La. 1977) 12

Butler v. Flint Goodrich Hospital, 607 So.2d 517, (La. 1992) 8

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). 13

Davis v. Omitowoju, 883 F.2d 1155 (3rd Cir. 1989) 16

Fein v. Permanente Medical Group, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985) 5, 6

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) 14

Hathorn v. Lovorn, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) 4

Hoffman v. United States, 767 F.2d 1431, (9th Cir. 1985) 16

Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) 8, 9

Lucas v. United States, 807 F.2d 414, (5th Cir. 1986) 17

Martinez v. State of California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed 2d 41 (1980) 12, 13

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) 14

McCulloch v. Maryland, 4 Wheat. 316,
4 L.Ed.2d 579 (1819) 9

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942,
56 L.Ed.2d 486 (1978) 4

Plyler v. Doe, 457 U.S. 202,
102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) 15

Rodrigue v. LaGros,
563 So.2d 248, (La. 1990) 4

San Antonio Independent School District
v.Rodriguez, 411 U.S. 1, 93 S.Ct. 1278,
36 L.Ed.2d 16 (1973) 13

United States v. Carolene Products Company, 304 U.S. 144,
58 S.Ct. 778, 82 L.Ed.2d 1234 (1938) 15

Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939,
59 L.Ed.2d 171 (1979) 16

Williams v. Kushner, 524 So.2d 191 (La. App.
4 Cir. 1988), amended and aff'd, 549 So.2d 294
(La. 1989) vi

STATEMENT OF THE CASE IN ADDITION TO THAT CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI

The Respondent wishes to point out to this Court that in support of their Motion for Summary Judgment, Respondents, Dr. Medley, Dr. McKenna, and Dr. Braud, as the proponents of the statutory limitation, introduced into the trial court record the entire record of the evidentiary hearing on the constitutionality of the instant statute in the case of Williams v. Kushner, (Civil District Court for the Parish of Orleans, No. 83-1115). This record contains the evidentiary showing made by the Louisiana Commissioner of Insurance, the Louisiana State Medical Society, and the Louisiana Medical Mutual Insurance Company as to the factual events leading up to the passage of the Louisiana Medical Malpractice Act in 1975, the purpose and rationale of the Legislature in passing the Act, and the actual effect that the Louisiana Medical Malpractice Act has had regarding the continuation of health care services for Louisiana citizens at a reasonable cost. This record consists of over 3,000 pages of testimony and voluminous documentary evidence. Based on this evidence, the trial court made factual findings relevant to its ruling that the instant statute is constitutional, and these factual findings were upheld by the Court of Appeal. Williams v. Kushner, 524 So.2d 191, 195 (La. App. 4 Cir. 1988), amended and aff'd, 549 So.2d 294 (La. 1989).

SUMMARY OF ARGUMENT

The Louisiana Patient's Compensation Fund submits that this Honorable Court should not exercise its jurisdiction in this matter. The principal legal argument presented to this Court by the Petitioner, that the Americans With Disabilities Act has created a substantial federal question in this case, was first presented to a court below through an Application for Rehearing on the issue of constitutionality to the Louisiana Supreme Court. The Louisiana Supreme Court as a general rule does not grant rehearings to consider issues raised for the first time, and it denied the Petitioners' Application for Rehearing. The Fund submits that the Petitioners' failure to comply with the state Supreme Court's procedural rule, forbidding raising new issues in an application for rehearing, should now bar this Court from exercising its jurisdiction to review the "federal question" created by the Americans With Disabilities Act. Comity to the states and the necessity of a properly developed record on appeal are among the considerations weighing against the exercise of this Court's jurisdiction.

In any event, this Honorable Court should not exercise its jurisdiction in this matter because the instant question of the constitutionality of a limitation of recovery in tort by victims of medical malpractice is not a substantial federal question. Such was the statement of this Court in 1985 in dismissing an appeal seeking the review of a decision by the California Supreme Court on this issue. Nor does the Petitioners' invocation of the Americans With Disabilities Act inject a federal question into this litigation. The Petitioners have argued that because the Americans With Disabilities Act contains a finding that "individuals with disabilities are a discrete and insular minority," the Act has obligated this Court to consider disabled Americans to constitute a suspect class for the purposes of federal equal protection analysis. The Fund submits that through the Americans With Disabilities Act, the Congress sought to end

discrimination in the areas of employment, public services, and public accommodations and services operated by private entities. The clear language of the Act demonstrates that the Congress did not intend to prohibit states from amending their own tort laws to limit the liability of certain groups. The congressional finding, to the effect that disabled persons constitute a discrete and insular minority, was simply not an attempt by Congress to subject every state law affecting disabled persons to heightened scrutiny under equal protection analysis. In any event, the Congress is not empowered under §5 of the Fourteenth Amendment, as argued by the Petitioners, to mandate that a particular classification is suspect and thus unconstitutional. Instead the Congress has the discretion to enact positive law to enforce the prohibitions of the Fourteenth Amendment. In short, §5 does not transfer the judicial power to the Congress, but it instead increases the legislative power of the Congress. Thus, the Petitioners' invocation of the Americans With Disabilities Act, as changing this Court's equal protection analysis of the instant statutory limitation and thereby creating a federal question, is ill-founded and must be rejected.

Finally, the Fund submits that the instant statutory limitation of liability is fully in conformity with the dictates of the Equal Protection Clause of the Fourteenth Amendment, because this law is based in reason and neither abridges a fundamental constitutional right nor creates a suspect or quasi-suspect classification. First, this Court has ruled that a state's interest in maintaining its own rules of tort is paramount to any discernable federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational. A fair inference of this ruling is that the right to recover in tort is not a fundamental right under the United States Constitution. Therefore, any legislative enactment affecting that right need only have a rational basis.

Second, the instant statute does not create a suspect or quasi-suspect classification. Even if this Honorable Court were to rule that the instant statute classifies on the basis of physical disability, this Court has already ruled that physically disabled persons do not constitute a suspect or quasi-suspect class. Furthermore, individuals disabled as a result of medical malpractice do not constitute a politically powerless minority entitled to heightened protection under the federal Equal Protection Clause. Their right to recovery in tort is vigilantly protected during the political process that regulates it by the plaintiffs' bar which has a strong interest in protecting statutory rights to recovery in tort. Because the instant statute does not implicate a suspect or quasi-suspect class, it need only have a rational basis which it clearly does.

Finally, various federal courts of appeal have ruled that statutory limitations of liability in medical malpractice actions similar to the one here at issue are fully constitutional vis-a-vis the equal protection guarantees of the Fourteenth Amendment. At the basis of these rulings is the recognition that such statutes clearly have a rational basis and that they affect neither fundamental rights nor create suspect classifications.

The Louisiana Patient's Compensation Fund respectfully requests that this Honorable Court either not exercise its jurisdiction in this matter or rule that the instant statute is fully constitutional.

ARGUMENT

I. This Court Should Not Exercise Its Jurisdiction Because The Petitioners' Arguments Regarding The Disabled Americans Act Were Not Timely Raised In The Court Below And Are Thus Not Properly Before This Court

The Petitioners first argued that the Americans With Disabilities Act, 42 U.S.C.A. §§12101 et seq., creates a federal question in this case in their Application for Rehearing to the Louisiana Supreme Court which was denied. (See Appendix to Petition at p. A-43.) The High Court of Louisiana generally does not grant rehearings to consider issues raised for the first time in an Application for Rehearing. *Rodrigue v. LaGros,* 563 So.2d 248, 257 (La. 1990). The Louisiana Patient's Compensation Fund, a respondent herein, respectfully suggests that the general rule articulated by the *Rodrigue* Court is a procedural rule which formed the basis of the Court's denial of the Petitioners' Application for Rehearing, at least as to the issue of the significance of the Americans With Disabilities Act.

This Court has recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring this Court's review of a federal question. *Hathorn v. Lovorn,* 457 U.S. 255, 262, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982), *citing, Michigan v. Tyler*, 436 U.S. 499, 512, n.7, 98 S.Ct. 1942, 1951 n.7, 56 L.Ed.2d 486 (1978). The Fund respectfully requests that this Honorable Court rule that the Petitioners' failure to comply with the afore-discussed state procedural rule constitutes a bar to this Court's review of a federal question that the Petitioners have attempted to raise through their invocation of the Americans With Disabilities Act.

Such a ruling by this Court would also be consistent with this Court's reluctance to exercise jurisdiction over questions not properly raised below. *See, Banker's Life and Casualty v. Crenshaw*, 486 U.S. 71, 79, 108 S.Ct. 1645, 1651, 100 L.Ed.2d 62 (1988). As this Court has stated, comity to the states and other considerations, chief among which is this Court's need for a properly developed record on appeal, all weigh heavily against this Court exercising its jurisdiction to consider a question not pressed or passed on below. 486 U.S. at 79, 108 S.Ct. at 1651.

Based on the foregoing, the Louisiana Patient's Compensation Fund respectfully requests that this Honorable Court not exercise its jurisdiction in this matter.

II. This Court Should Not Exercise Its Jurisdiction Because The Petition For Writ of Certiorari Does Not Raise A Substantial Federal Question.

A. A Federal Equal Protection Challenge To A State Statutory Limitation On Recovery In Medical Malpractice Actions Does Not Present A Substantial Federal Question.

This Honorable Court has previously dismissed an appeal of a case challenging, on federal due process and equal protection grounds, the constitutionality of a state statute limiting the recovery of non-economic damages in medical malpractice actions. *Fein v. Permanente Medical Group*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985). The reason given this Court for the dismissal was that "The appeal is dismissed for want of a substantial federal question." *Id.*

The statue challenged in the instant case similarly limits the recovery of damages in medical malpractice actions exclusive of medical expenses, legal interest and costs. The

Louisiana Patient's Compensation Fund suggests that, as in *Fein v. Permanente Medical Group, supra*, the instant constitutional challenge does not place before this Court a substantial federal question, and for that reason, the Petition should be denied.

The Petitioners have represented to this Court that "the passage of the [Americans With Disabilities] Act has created a substantial federal question on the constitutionality of caps on damages." (See Petition for Writ of Certiorari at p. 12.) The Fund respectfully submits that this federal law in no way created a substantial federal question, for the reasons outlined in Section B, *infra.*

B. The Americans With Disabilities Act Does Not Create a Substantial Federal Question In This Case

The Petitioners have argued that the United States Congress, through the Americans With Disabilities Act, 42 U.S.C.A. §§12101-12213, has legislated that disabled persons, including victims of medical malpractice, are suspect classes within the meaning of the Equal Protection Clause of the Fourteenth Amendment and that therefore a substantial question exists in this case. (See Petition for Writ of Certiorari at 10-13.) They base this argument on a "finding" by the Congress that "individuals with disabilities are a discrete and insular minority..." 42 U.S.C.A. §12101(a)(7).

The Louisiana Patient's Compensation Fund submits that first the Americans With Disabilities Act does not legislate that disabled persons constitute a suspect class for the purposes of Equal Protection analysis; and, second, while Section 5 of the Fourteenth Amendment confers upon the United States Congress broad powers to enforce that Amendment, it does not empower the Congress to exercise

the judicial function of determining the meaning of the Constitution.

Through the Americans With Disabilities Act the Congress sought:

> To invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C.A. §12101(b)(4). In accordance with that purpose, the Congress prohibited discrimination against certain individuals with disabilities in what it considered to be the "major areas of discrimination" --- in employment, in the provision of public services, and in the provision of public accommodations and services operated by private entities. (See Subchapter I, Subchapter II, and Subchapter III of the Americans With Disabilities Act.) By eliminating these major areas of discrimination, the Congress hoped to further the nation's proper goals of assuring equality of opportunity, full participation, independent living, and economic self-sufficiency for disabled individuals. 42 U.S.C.A. §12101(a)(8).

The Fund submits that the Congress sought to enforce the Fourteenth Amendment by prohibiting discrimination in the areas addressed in Subchapters I through III of the Americans With Disabilities Act and that it made the finding relied upon by the Petitioners, that disabled persons are a discrete and insular minority, in order to provide support for its invocation of the Fourteenth Amendment as empowering it to end the discrimination directly addressed in the Act. In effect, the Congress found that there was no good reason for discrimination against qualified disabled persons in the three areas that it identified as being "major areas of

discrimination." Thus, the Act in no way constitutes a congressional mandate that the judiciary rule that all classifications of individuals with disabilities are suspect for the purposes of equal protection analysis.[1]

Furthermore while the Congress has the power in its own right, under §5 of the Fourteenth Amendment, to enact positive law to enforce the Fourteenth Amendment, it does not have the power to define the Equal Protection Clause for the Judiciary. U.S. Const. amend. XIV, §5 provides:

> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

This Honorable Court has interpreted Section 5 to confer broad powers upon the Congress to enact legislation to enforce the prohibitions of the Equal Protection Clause. *Katzenbach v. Morgan,* 384 U.S. 641, 650, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966). In *Katzenbach*, this Court

[1] The petitioners have not argued that the Act addresses statutory limitations of liability as a "major area of discrimination" and therefore itself prohibits such a limitation in medical malpractice actions. Indeed, The Louisiana Supreme Court below found that the Louisiana Medical Malpractice Act ensures the recovery of all medical expenses of an injured victim of medical malpractice and the recovery of damages up to $500,000 plus interest and costs. *Butler v. Flint Goodrich Hospital,* 607 So.2d 517, 521 (La. 1992), at p. A-15 of the Appendix to the Petition for Writ of Certiorari. The guaranteed payment of these sums can only further the Congress' stated purpose of assuring full participation, independent living, and economic self-sufficiency for disabled individuals. And further, this guaranteed payment is indeed a benefit conferred upon the more severely injured victims of medical malpractice that victims of other types of tort do not enjoy.

ruled that Congress' power under Section 5 was not limited to prohibiting state legislative classifications that the Judiciary would itself rule were violative of Fourteenth Amendment Equal Protection. 384 U.S. at 648, 86 S.Ct. at 1722. Instead, legislation enacted by Congress to enforce the Fourteenth Amendment need only be "appropriate", with the reach of that broad congressional power to be formulated thusly:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

384 U.S. at 650-651, 86 S.Ct. 1723, *quoting, McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed.2d 579 (1819). In short, this Court ruled that:

> Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

484 U.S. at 651, 86 S.Ct. at 1723-1724. Thus, this Court ruled that §5 provided the Congress with much discretion in determining which legislation was appropriate to enforce the Fourteenth Amendment and that this Court would give appropriate deference to Congressional decisions as to which legislation was appropriate. This Court did not rule, however, that §5 empowered the Congress to assume the judicial function of defining the meaning of the Equal Protection Clause, including the designation of suspect classifications.

Because §5 of the Fourteenth Amendment does not confer upon Congress the power to mandate that the Judiciary rule that a state statute is violative of Fourteenth Amendment equal protection guarantees, the findings articulated by the Congress cannot bind this Court as it considers the constitutionality of the statute before it. If the Congress were to enact a law prohibiting a state statutory limitation of liability, then this Honorable Court would have the duty of determining whether the Congress had acted within its broad discretion under §5. The Americans With Disabilities Act does not contain such a prohibition, so that issue is not now before this Court.

Based on the foregoing, the Fund respectfully contends that the Americans With Disabilities Act can in no way affect this Honorable Court's scrutiny of La. R.S. §40:1299.42(B) vis-a-vis equal protection guarantees of the United States Constitution. Therefore, the Americans With Disabilities Act has not injected into this case a substantial question of federal law needed to be settled by this Court.

III. La. R.S. §40:1299.42(B) Does Not Violate The Equal Protection Guarantees Of The Fourteenth Amendment

The instant Petition for Writ of Certiorari presents the question of the constitutionality of La. R.S. §40:1299.42(B), which limits medical malpractice recovery from health care providers qualified under the Louisiana Medical Malpractice Act, La. R.S. §40:1299.41 et seq., to $500,000 plus medical care and related benefits, plus legal interest and costs. The Louisiana Patient's Compensation Fund respectfully contends that the instant limitation of liability is a responsible exercise of the Louisiana Legislature's power and is fully constitutional under the Equal Protection Clause of the United States Constitution.

There can be no doubt that individual human beings live together in cooperative societies because such societies have the great potential for providing those individuals with better lives. This, of course, is because individuals within cooperative human societies transmit beneficial knowledge gained through their own individual effort to other members of the society, thereby sparing the recipients from having to develop that knowledge independently. And the recipients of such knowledge are thus free to develop other knowledge through their own individual efforts which can then be transmitted throughout the society. This sharing of knowledge is cooperation. Because it allows the society to build upon its knowledge instead of requiring it to constantly rediscover it, the cooperative development of knowledge results in a tremendous growth in the amount of knowledge possessed by the society as a whole. This increased knowledge can be, and often is, applied to increase the individual's likelihood of leading a long and personally fulfilling life. The Fund submits that the People of Louisiana originally formed and now maintain the State of Louisiana in order to avail themselves of the benefits of human cooperation.[2] And, of course, one of the principal benefits of human cooperation is applied medical science.

A cooperative society is an interdependent society in that each member depends upon others to behave in a cooperative manner and to provide specialized knowledge in their various fields of expertise. This interdependence inevitably leads to interactions among the members of the society. Louisianians and other Americans alike place a premium, however, on their independence of thought and of action. Because of this independence, differences of opinion inevitably arise as to the course the society should take. The People of Louisiana, through the Constitution of Louisiana of

---

[2] The existence of the State of Louisiana as one of the United States of America multiplies the benefits of cooperation available to the People of Louisiana.

1974, have chosen the democratically elected Legislature as the branch of government to direct the course of our society through the creation of rules binding upon each individual within our society. La. Const. Ann. arts. II, §2 and III, §1. This legislative power is plenary, except as limited by the Federal and State Constitutions. U.S. Const. amend. X; U.S. Const. art. VI, cl. 2; *Board of Secondary and Elementary Education v. Nix*, 347 So.2d 147, 153 (La. 1977).

Inherent in the concept of law binding upon members of a democratic society is the assent of the members of that society to be bound by legally enacted law. The petitioners in this matter now claim that they have not assented to the law here at issue. They argue that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which was ratified by the People of Louisiana on July 9, 1868, in fact prohibits this law.

The Fund respectfully submits that the rulings of this Honorable Court and of the lower federal courts are contrary to the Petitioners' position. Specifically, the federal jurisprudence is clear that a state statutory limitation of liability neither affects a fundamental constitutional right nor creates a suspect or quasi-suspect classification, so such a limitation need only have a rational basis to survive federal equal protection scrutiny. Further, the federal courts have ruled that limitations of the liability of health care providers that are for all practical purposes identical to the one here at issue have a rational basis and are thus fully constitutional vis-a-vis Fourteenth Amendment Equal Protection guarantees.

First, this Court has indicated that any right to recovery in tort is not a fundamental constitutional right requiring heightened scrutiny. This Court has stated that a state's interest in maintaining its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational. *Martinez v. State of*

California, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed 2d 41 (1980). Based on that recognition, this Court ruled that a California statute immunizing public entities and employees from liability for injuries caused by paroled prisoners was constitutional as a reasonable exercise of the legislative power. 444 U.S. at 280, 283, 100 S.Ct. at 556, 558. Therefore, this Honorable Court has recognized that any constitutional right to recover in tort, if existent, is far from fundamental and must yield to the will of the People, as expressed through the Legislature, unless the Legislature acts in a wholly arbitrary or irrational manner.

The ruling of the *Martinez* Court is entirely consistent with this Honorable Court's recognition that it is not the provence of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973). Instead, it is the duty of this Court to assess the fundamentality of a right based on whether the right is explicitly or implicitly guaranteed by the United States Constitution. 411 U.S. at 33-34, 93 S.Ct. at 1297. Of course, this Honorable Court has never ruled that the United States Constitution explicitly or implicitly guarantees full recovery in tort.

Second, this Court has ruled that physically disabled persons do not constitute a suspect or quasi-suspect class. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). In distinguishing between a classification based on sex, which it had previously found quasi-suspect, and a non-quasi-suspect classification such as one based on physical disability, the *Cleburne* Court stated:

> "[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability... is that the sex characteristic frequently bears no relation to

> ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973) (Plurality Opinion).

473 U.S. at 440-441, 105 S.Ct. at 3254-3255. The *Cleburne* Court further stated:

> The lesson of *Murgia [Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)] is that where individuals in the group affected by law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interest should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

473 U.S. at 441-442, 105 S.Ct. at 3255. There is little doubt that the instant statute has a rational basis.[3]

Furthermore, the Fund submits that a classification of persons injured as a result of medical malpractice is not a suspect or quasi-suspect classification for the purposes of equal protection analysis, even if the general classification of disabled individuals were suspect or quasi-suspect. The Equal Protection Clause of the Fourteenth Amendment provides heightened protection to discrete and insular minorities within our society against whom the majority possesses prejudice which tends to seriously curtail the

---

[3] See the discussion of the Federal Court of Appeals cases, *infra*.

operation of those political processes ordinarily relied upon to protect minorities. *Plyler v. Doe*, 457 U.S. 202, 217, n.14, 102 S.Ct. 2382, 2394 n.14, 72 L.Ed.2d 786 (1982); *United States v. Carolene Products Company*, 304 U.S. 144, 152-153 n.4, 58 S.Ct. 778, 783-784, n.4, 82 L.Ed.2d 1234 (1938). Thus, heightened equal protection exist to protect minorities relegated to a position of powerlessness and for whom the normal political process cannot proceed properly. *Plyler*, 457 U.S. at 217, 102 S.Ct. at 2324.

The Fund respectfully suggests that the class of catastrophically injured victims of medical malpractice is not a politically powerless class in need of heightened equal protection. The Fund submits that the rights of persons catastrophically injured as a result of medical malpractice are vigilantly guarded by a very powerful segment of our society, the plaintiffs' bar, who have a strong interest in full recovery in tort. There can be no doubt that the plaintiffs' bar participates not only in the litigation of the constitutionality of limitations of liability, but also in the political process that gives rise to such limitations. Thus, the interests of future victims of medical malpractice are fully protected through the democratic process, and heightened scrutiny is not required. And, as this Court has stated:

> [...]in cases where [a statutory classification burdens neither a suspect group nor a fundamental interest], courts are quite reluctant overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absence some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Vance v. Bradley, 440 U.S. 93, 96-97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979). Therefore, the intervention of this Court is not now warranted.

In accordance with the rulings of this Honorable Court, the federal Courts of Appeals have upheld the constitutionality of state statutory limitations of recovery in medical malpractice actions vis-a-vis guarantees of equal protection provided by the Fourteenth Amendment. In *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985), the Court held that a California statute limiting the recovery of non-economic losses of medical malpractice victims to $250,000 did not violate federal guarantees of equal protection. The Court based its decision on its recognition that the limitation neither interfered with fundamental rights nor created a suspect or quasi-suspect classification, so the statute was subject only to rational basis scrutiny. *Id.* at 1435-1436. The Court stated:

> The legislative purpose of [the statutory limitation] is not difficult to discern. §3333.2 was written as part of a complex plan designed to reduce the dramatic rise in medical malpractice insurance premiums. Since these high rates were adversely affecting the quality of the medical services provided to the people of California, reduction of the rates was a legitimate state purpose.

Id. at 1437. The *Hoffman* Court found that basis to be rational and ruled the statute constitutional. *Id.* at 1437. In *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989), the plaintiff challenged a Virgin Island statute capping medical malpractice verdicts at $250,000 for non-economic damages on various federal constitutional grounds, including the Fourteenth Amendment Equal Protection. The *Davis* Court ruled the statute constitutional vis-a-vis equal protection guarantees because the limitation on recovery had a rational

basis and did not violate a fundamental right or create a suspect class. The Court stated:

> Clearly, the Virgin Islands' decision to curb, through legislation, the high cost of medical malpractice insurance and thereby promote quality medical care to the residents of the Islands, provides a rational basis for capping the amount of damages that can be awarded to a plaintiff.

Id. at 1158. Other federal courts have ruled that similar limitations on recovery in medical malpractice actions have a rational basis and are thus constitutional under the Fourteenth Amendment. *See e.g., Lucas v. United States,* 807 F.2d 414, 422 (5th Cir. 1986).

Based on the foregoing, the Louisiana Patient's Compensation Fund respectfully submits that La. R.S. §40:1299.42(B) has a rational basis and is thus fully constitutional under the Fourteenth Amendment of the United States Constitution.

It follows then that the Petitioners have in no way withheld their assent to the statute here at issue. Through their ratification of the Louisiana Constitution of 1974, they and the rest of the People of Louisiana have placed the issue of recovery in tort in the hands of the Louisiana Legislature, as long as the legislative decision is not arbitrary.

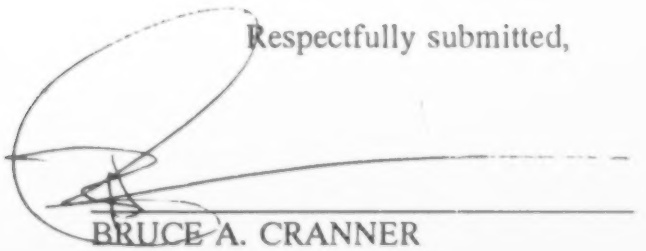
There can be no doubt that applied medical science is a benefit of cooperation through which individuals secure their lives and their pursuit of happiness. The People of Louisiana, through normal political process, have reasonably determined that an individual's full recovery in tort must yield to the public need of continued availability of health care. The Fund respectfully submits that any private mischief occasion by the instant statute is fully warranted by the benefits of society which man has enjoyed and still must

have as he continues his ascent from the cave to the stable to the stars.

CONCLUSION

For the reasons stated above, the Louisiana Patient's Compensation Fund, Respondent, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari. Should a Writ of Certiorari be granted, the Respondent asks that the statute be declared fully constitutional vis-a-vis the Equal Protection Clause of the United States Constitution.

Respectfully submitted,



BRUCE A. CRANNER
COUNSEL OF RECORD
C.T. WILLIAMS, JR.
J. ELLIOTT BAKER
BLUE, WILLIAMS & BUCKLEY, L.L.P
3421 N. Causeway Boulevard
Ninth Floor
Metairie, LA 70002-3760
Telephone: (504) 831-4091
ATTORNEYS FOR THE LOUISIANA
PATIENT'S COMPENSATION FUND,
RESPONDENT

FILED
APR 8 199
OFFICE

NO. 92-1487

In The
Supreme Court of the United States

October Term 1992

CLEO ALLEN BUTLER,
Individually and For and on Behalf of the Minor,
Michelle Butler, and ARLENE MAJOR,
As Custodian of the Minor, Michelle Butler,
Petitioners,

Versus

JEROME T. MEDLEY, M.D.,
WARREN P. MCKENNA, JR., M.D.,
and JOSEPH P. BRAUD, M.D.,
Respondents.

On Petition for
Writ of Certiorari to the
Supreme Court of Louisiana

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS, HAYES AND BEAHM
By: HAROLD A. THOMAS*
FRANKLIN D. BEAHM
1000 One Poydras Plaza
639 Loyola Avenue
New Orleans, Louisiana 70113
Telephone: (504) 523-5100
Attorneys for Respondent, Joseph P. Braud, M.D.
*Counsel of Record

ADAMS AND REESE
By: ROBERT J. CONRAD, JR.*
LAWRENCE L. MCNAMARA
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Attorneys for Respondents, Jerome T. Medley, M.D. and Warren P. McKenna, Jr., M.D.
*Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this case are:

(a) whether the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, requires medical malpractice plaintiffs to be considered a "suspect class" for purposes of Equal Protection analysis under the United States Constitution; and

(b) whether a Louisiana statute which limits the recovery of plaintiffs in medical malpractice actions to $500,000, together with full recovery of medical expenses, La. Rev. Stat. § 40:1299.42(B), is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

1. *Petitioner.* The sole party plaintiff below, and thus the sole proper petitioner herein, is ARLENE MAJOR, in her capacity as tutrix of Michelle Butler. Although petitioner's counsel additionally lists Cleo Allen Butler and Michelle Butler as parties to this proceeding, Arlene Major was substituted for Cleo Allen Butler as sole plaintiff herein by pleadings filed in 1985 and Michelle Butler is not and has never been a party to this action in her own right.†

2. *Respondents.* Respondents herein are JEROME T. MEDLEY, M.D., WARREN P. MCKENNA, JR., M.D., and JOSEPH P. BRAUD, M.D. The LOUISIANA PATIENT'S COMPENSATION FUND, a statutory fund constituted under the Louisiana Malpractice Act* to provide compensation to malpractice plaintiffs beyond a health care provider's limits of liability, remains a party interested in this proceeding and appears herein as respondent, though final judgment was entered against it two years ago, pursuant to the Fund's confession of judgment, and that judgment has not been questioned by petitioner in the courts below.

---

†Initially brought by Cleo Allen Butler as "duly authorized tutrix" and mother, and Arlene Major as "custodian" of the minor, Michelle Butler, Claim for Damages–Jury Trial Requested, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Dec. 7, 1981), through a succession of supplemental and amended pleadings, Arlene Major was first eliminated as plaintiff, First Supplemental and Amending Petition (filed June 16, 1982), and later substituted for Cleo Allen Butler as tutrix of Michelle Butler and sole plaintiff herein. Eighth Supplemental and Amending Petition (filed Jan. 15, 1985). Arlene Major was confirmed as tutrix for Michelle Butler, then a minor, on January 4, 1985. Letters of Tutorship, In Re: Michelle Butler, No. 85-00121 (Civ. D. Ct., Orleans Parish, La., Jan. 4, 1985). Arlene Major is the maternal grandmother of Michelle Butler. Though now an adult, Michelle Butler has never been added or substituted as a party plaintiff herein.

*LA. REV. STAT. ANN. §§ 40:1299.41–.48 (West 1992 & Supp. 1993).

3. *Other Parties Below*. Beyond the parties identified here as respondents, plaintiffs' original petition for damages named four additional defendants: Flint-Goodridge Hospital of Dillard University (Flint-Goodridge), Sandra Viglia, the Westbank Medical Center, Ltd. (WMC), and Sherman Bernard, Commissioner of Insurance, State of Louisiana. Plaintiffs' claims against Flint-Goodridge, Sandra Viglia and WMC were settled in 1985 and judgment was entered dismissing those defendants. The Commissioner of Insurance was named solely in his capacity as statutory administrator of the Patient's Compensation Fund. By subsequent legislative act, that responsibility has now been transferred to a Patient's Compensation Fund Oversight Board.

4. *Recital Required by Rule 29(c)*. As required by Sup. C. R. 29(c), it is noted that by the instant petition for certiorari, as she had below, petitioner questions the constitutionality of a Louisiana statute, La. Rev. Stat. § 40:1299.42, and neither the State of Louisiana nor any agency, officer, or employee thereof is a party to this proceeding;†† 28 U.S.C. § 2403(b) may be applicable. It is unknown whether petitioner has served her petition for certiorari on the Attorney General of the State of Louisiana.

---

††The Patient's Compensation Fund is not itself an agency of the State of Louisiana.

Table of Contents

	Page
Questions Presented For Review	i
Parties To the Proceedings	ii
Table of Contents	iv
Table of Authorities	v
The Statute at Issue	3
Statement of the Case	6
Argument	11
I. The Issue on Which Petitioner Seeks Review by the Court was not Timely Presented to or Decided by the Supreme Court of Louisiana	11
II. Petitioner's Equal Protection Claim Does Not Present a Substantial Federal Question	15
III. There is No Conflict Among the Courts on the Constitutionality of Limitations on Malpractice Recovery as a Matter of Federal Equal Protection	19
Conclusion	22

Table of Authorities

Page

CASES

Adams v. Children's Mercy Hospital, 832 S.W.2d 989 (Mo.), *cert. denied*, 506 U.S. ___, 113 S.Ct. ___, 121 L.Ed.2d 446 (Nov. 16, 1992) 18

Beck v. Washington, 369 U.S. 541 (1961) 15

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 21

Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984) 13 n.38

Butler v. Flint Goodrich Hosp., 607 So.2d 517 (La. 1992) 10

Butler v. Flint-Goodridge Hospital, 354 So.2d 1070 (La. App. 4th Cir.), *writ denied*, 362 So.2d 547 (LA. 1978) 6 n.15

Cardinale v. Louisiana, 394 U.S. 437 (1969) 15

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 17

Coburn v. Augustin, 627 F.Supp. 983 (D. Kan. 1985) 13

Davis v. Omitowoju, 833 F.2d 1155 (3d Cir. 1989) 21

DiAntonio v. Northampton-Accomack Memorial Hospital, 628 F.2d 287 (4th Cir. 1980) 13 n.38

Everett v. Goldman, 359 So.2d 1256 (1978) 4

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 15

Fein v. Permanente Medical Group, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d

665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985) 14 n.40, 18 n.46

Ferguson v. Garmon, 643 F.Supp. 335 (D. Kan. 1986) 13

Fitz v. Dolyak, 712 F.2d 330 (8th Cir. 1983) 13 n.38

Gronne v. Abrams, 793 F.2d 74 (2d cir. 1986) 13 n.38

Hanson v. Denckla, 357 U.S. 235 (1958) 2, 14

Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) 13 n.38, 21

Jewson v. Mayo Clinic, 691 F.2d 405 (8th Citr. 1982) 13 n.38

Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) 18 n.47

Katsenbach v. Morgan, 384 U.S. 641 (1966) 17

Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) 13 n.38, 21

Montagineov. Canale, 792 F.2d 554 (5th Cir. 1986) 13 n.38

Owens v. United States, 935 f.2d 734 (5th Cir. 1991) 9 n.25

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 14

San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1972) 18

Sibley v. Board of Supervisors of La. State U., 462 So.2d 149, *modified on rehearing*, 477 So.2d 1094 (La. 1985) ..... 8, 12, 13 n.38, 15 & nn42-43

Valentine v. Thomas, 443 So.2d 289, 292 (La. App. 1st Cir.), *writ denied*, 440 So.2d 728 (La. 1983) 4

Webb v. Webb, 451 U.S. 493 (1981) 2

Webb v. Webb, 451 U.S. 493 (1981) 15

Williams v. Kushner, 524 So.2d 191 (La. App. 4th cir. 1988), *aff'd on other grounds*, 549 So.2d 294 (La. 1989) 4, 8, 9, 10

Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979) 13 n.38

CONSTITUTTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. 14 ..... 13 n.37

28 U.S.C. § 1257 15

28 U.S.C. § 2403(b) iii

42 U.S.C. §§ 12101-12213 ..... i, 11 n.32

La. Const. 1974, Art. I, § 22 ..... 16 n.43

La. Rev. Stat. § 40:1299.37 ..... 3 n.4

La. Rev. Stat. § 40:1299.38 ..... 3 n.4

La. Rev. Stat. § 40:1299.39 ..... 3 n.4

La. Rev. Stat. § 40:1299.40 ..... 3 n.4

La. Rev. Stat. Ann. §§ 40:1299.41-.48 (West 1992 & Supp. 1993) ..... ii, 3 n.4, 4 n.8, 6 n.16

La. Rev. Stat. § 40:1299.42 ..... iii, 7

La. Rev. Stat. § 40:1299.42(A) 4 n.9

La. Rev. Stat. § 40:1299.42(B) ..... i, 4 & n.12, 5, 8-10, 12-14, 16 & n.43

La. Rev. Stat. § 40:1299.43 7

La. Rev. Stat. § 40:1299.44 ..... 4 n.9

La. Rev. Stat. § 40:1299.44(C)(5) 7 n.18

La. Rev. Stat. § 40:1299.47 ..... 4 n.9

La. Rev. Stat. § 40:1299.51–.56 ..... 3 n.4

OTHER AUTHORITIES

U.S. Dept. of Health, Ed. & Wel., Pub. No. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 3 n.5

Note, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976) ..... 4 nn. 6 & 7

In The
Supreme Court of the United States

October Term 1992

CLEO ALLEN BUTLER,
Individually and For and on Behalf of the Minor,
Michelle Butler, and ARLENE MAJOR,
As Custodian of the Minor, Michelle Butler,

Petitioners,

Versus

JEROME T. MEDLEY, M.D.,
WARREN P. MCKENNA, JR., M.D.,
and JOSEPH P. BRAUD, M.D.,

Respondents.

On Petition for
Writ of Certiorari to the
Supreme Court of Louisiana

By the petition for writ of certiorari herein, the Court is pressed to review an opinion of the Supreme Court of Louisiana confirming the constitutionality of a facet of the Louisiana Medical Malpractice Act which, without affecting recovery of all medical expenses, limits recovery of general damages in a malpractice action to $500,000. Having previously grounded her desultory challenges to the statute almost exclusively in various Louisiana Constitutional provisions, petitioner is necessarily relegated here to the single contention that the statute "violates the equal protection clause of the Fourteenth Amendment of the United States Constitution."[1]

---

[1] Petition for Writ of Certiorari 17.

But, conceding implicitly here as she had explicitly below that the statute would certainly survive scrutiny under the well-established principles of Equal Protection analysis, petitioner now advances a novel and truly extraordinary two-part theory: that the Americans with Disabilities Act of 1990 (ADA) compels the Court to treat disabled persons ("individuals with disabilities") as a "suspect class" for purposes of Equal Protection analysis;[2] and that a law limiting the damages recoverable by a medical malpractice plaintiff discriminates against disabled persons.

The theory is extraordinary for its underlying premises that the Congress may broaden the reach of constitutional protections by simple statutory fiat and that limitations on damages discriminate against malpractice plaintiffs "because of" their physical disability. It is doubly novel in that such a proposition has never been accepted by any court and, more significantly, in that petitioner's contentions to this effect were articulated, for the first time, *after* the Louisiana Supreme Court had decided this case, in her petition for rehearing. That court, as a result, had no occasion to reach or decide the issue which petitioner now urges on the Court.

The subject petition is, thus, jurisdictionally defective, for the federal questions which it seeks to present are raised here in the first instance and were neither decided by nor timely presented to the state court whose opinion is challenged. *Webb* v. *Webb*, 451 U.S. 493 (1981); *Hanson* v. *Denckla*, 357 U.S. 235 (1958). Even were this case reviewable on certiorari, moreover, it does not present a federal question which is substantial in any sense, nor does it evince any significant reason to command the Court's attention. Because there is none, petitioner identifies no conflict among the Federal appellate courts, among state courts of last resort, or between a state supreme court and a Federal court of appeals. And because the Louisiana Supreme Court had no occasion to consider petitioner's constitutional claim *du jour*, it clearly cannot be said that that court "has decided a federal question in a way that conflicts with applicable decisions of this Court. Sup. C. R. 10.1.

---

[2] *Id.* 10.

This brief, accordingly, is submitted jointly on behalf of the respondents Jerome T. Medley, M.D., Warren P. McKenna, Jr., M.D., and Joseph P. Braud, M.D.,[3] in opposition to the petition for writ of certiorari filed herein. Whether for lack of jurisdictional bases, for want of a "special and important" reason under Rule 10, or otherwise, this case simply does not warrant review by the Court.

THE STATUTE AT ISSUE

The statute at issue in this case, limiting a plaintiff's recovery in a malpractice action against health care providers enrolled with a state-administered patient's compensation fund, is but one of a fascicle of measures enacted by the Louisiana Legislature during 1975 and 1976 as remedial responses to a medical malpractice crisis,[4] a crisis of nationwide breadth and concern,[5] engendering a variety of state legislative responses focused principally at "guaranteeing the availability of malpractice insurance, modifying tort doc-

[3]Drs. Medley and McKenna are and have been represented in this litigation by Adams and Reese, New Orleans, Louisiana. Dr. Braud is represented by Thomas, Hayes and Beahm, New Orleans, Louisiana.

[4]*See, e.g.*, Acts 1975, No. 477, *as amended*, LA. REV. STAT. ANN. § 40:1299.37 (West 1992 & Supp. 1993) (malpractice coverage for state hospitals); No. 674, *as amended*, LA. REV. STAT. ANN. § 40:1299.38 (malpractice coverage for state employees); No. 529, *as amended*, LA. REV. STAT. ANN. § 40:1299.40 (uniform consent law); No. 798, *as amended*, LA. REV. STAT. ANN. §§ 40:1299.51-.56 (medical consent law); No. 817, *as amended*, LA. REV. STAT. ANN. §§ 40:1299.41-.48 (medical malpractice law); Acts 1976, No. 66, *as amended*, LA. REV. STAT. ANN. § 40:1299.39 (medical malpractice law for state institutions and employees).

[5]Perhaps the most comprehensive treatment of the medical malpractice crisis at the time was given in U.S. Dept. of Health, Ed. & Wel., Pub. No. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973).

trines in malpractice claims, or reducing the occurrence of malpractice."[6] The problem was said to reflect an "intricate network of interrelated causes and effects,"[7] though the immediate cause for remedial legislation in Louisiana was the deteriorating condition of the health care liability insurance market, confronting professional and institutional providers with rapidly escalating, and in some instances prohibitive, costs, and prompting many insurers to withdraw from the market altogether. See *Everett* v. *Goldman*, 359 So.2d 1256, 1261 (La. 1978).

Among the measures adopted by the Louisiana Legislature were a series of statutes now commonly referred to as the Medical Malpractice Act (the Act),[8] providing for pre-suit submission of malpractice claims for screening by a "medical review panel;"[9] establishing a Patient's Compensation Fund (the Fund), funded by premium-like surcharges paid by enrolled health care providers, as a fund for payment of catastrophic damages;[10] requiring health care providers, as a condition of enrollment with the fund, to demonstrate financial responsibility by evidencing insurance or self-insurance sufficient to pay claims up to $100,000;[11] and limiting the recovery of damages in any case to $100,000 from a qualified health care provider and an additional $400,000 from the Fund.[12] The recovery limitation fixed by La. Rev. Stat. § 40:1299.42(B), thus, was but part of numerous integrated measures "passed in response to sharp increases in medical malpractice insurance rates and the resulting threat of reduced health care to the patient and of greatly increased medical costs to the public." *Valentine* v.

---

[6]Note, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

[7]*Id.*

[8]LA. REV. STAT. ANN. §§ 40:1299.41–.48 (West 1991 & Supp. 1993).

[9]La. Rev. Stat. § 40:1299.47.

[10]La. Rev. Stat. § 40:1299.44.

[11]La. Rev. Stat. § 40:1299.42(A).

[12]La. Rev. Stat. § 40:1299.42(B).

Thomas, 433 So.2d 289, 292 (La. App. 1st Cir.), *writ denied*, 440 So.2d 728 (La. 1983).

As respects malpractice actions against health care providers qualified and enrolled with the Fund under the Act, La. Rev. Stat. § 40:1299.42(B) provides that:

> (1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and costs.
>
> (2) A health care provider qualified under this Part is not liable for an amount in excess of one hundred thousand dollars for all malpractice claims because of injuries to or death of any one patient.
>
> (3)(a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40: 1299.44(C).
>
> (b) The total amounts paid in accordance with Paragraphs (2) and (3) of this Subsection shall not exceed the limitation as provided in Paragraph (1) of this Subsection.[13]

The reference to La. Rev. Stat. § 40:1299.43, it should be noted, reflects a 1984 amendment of the Act to provide for the Fund's payment of all future medical care and related expenses incurred by a plaintiff as a consequence of the malpractice incident complained of, recognizing such provision as an exception to the limitation imposed by § 1299.42(B).[14]

---

[13]Acts 1975, No. 817, *as amended by* Acts 1984, No. 435.

[14]By the terms of the 1984 act, the exception was made applicable only to claims filed on or after September 1, 1984, as a result of which the present case would be controlled by the pre-amended version of § 1299.42(B). But in *Williams* v. *Kushner*, 549 So.2d 294 (La. 1989), the Supreme Court "reformed" the Act to

STATEMENT OF THE CASE

This is a medical malpractice action for damages said to have been suffered by Michelle Butler, then a minor, as the result of a surgical procedure performed in May 1976 at Flint-Goodridge Hospital of Dillard University (Flint-Goodridge). Alleging negligence in the administration of anesthesia and in the conduct of the surgery, the original petition joined as defendants Flint-Goodridge; Sandra Viglia, a hospital-employed nurse-anesthetist who attended the procedure; Joseph P. Braud, M.D., as the "staff anesthesiologist" for the hospital; and Jerome T. Medley, M.D., and Warren P. McKenna, Jr., M.D., as the surgeons who performed the procedure.[15] Recognizing that all defendants were qualified and enrolled with the Patient's Compensation Fund under the Louisiana Medical Malpractice Act,[16] and seeking recovery of compensation from the Fund beyond that sought from the individual defendants and, indeed, beyond the maximum permissible recovery under the Act, the original petition also named defendant the then Commissioner

(footnote cont'd)

make the future medicals provision applicable to claims, such as the instant action, still pending when the subject amendment was adopted.

[15]Claim for Damages—Jury Trial Requested, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Dec. 7, 1981) [hereinafter referenced as Original Petition]. This action actually had its genesis some five years earlier, when the action was sought to be filed against Flint-Goodridge and Drs. Medley and McKenna prior to the submission of the claim to a medical review panel as required by the Medical Malpractice Act. Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 76-13030 (Civ. D. Ct., Orleans Parish, La.). Rejecting plaintiff's challenge to the constitutionality of the Act in that respect, the trial court sustained exceptions of prematurity interposed by the defendants and dismissed the action as against all defendants. The judgment was affirmed by a state appellate court and writs were denied by the Louisiana Supreme Court. Butler v. Flint-Goodridge Hospital, 354 So.2d 1070 (La. App. 4th Cir.), *writ denied*, 362 So.2d 574 (La. 1978).

[16]Acts 1975, No. 817, *as amended*, LA. REV. STAT. ANN. §§ 40:1299.41-1299.48 (West 1992 & Supp. 1993).

of Insurance in his capacity as administrator of the Fund, and prayed that "LRS 40:1299 *et seq.*, be declared unconstitutional...."

Plaintiff effected a settlement of her claims against Flint-Goodridge and the defendant CRNA in 1985, receiving payment of $100,000, while reserving her rights against the remaining defendants (*i.e.*, Drs. Braud, Medley and McKenna and the Fund).[17] Because the settlement constituted an admission of the liability of Flint-Goodridge and its nurse-anesthetist for purposes of seeking additional compensation from the Fund,[18] the Fund stipulated to its liability and confessed judgment for the maximum amount of recovery permissible against it under La. Rev. Stat. § 40:1299.42—*i.e.*, an "additional $400,000 together with legal interest from the date on which the claim was initiated with the Commissioner...and for court costs."[19] The district court subsequently entered judgment against the Fund for $400,000, interest from the date of the claim, and for "medical care and related expenses" pursuant to La. Rev. Stat. § 40:1299.43.[20] Because plaintiff refused to accept payment of the judgment, in early 1991 the Fund deposited the amount represented by the judgment in the registry of the court. Inexplicably, to this date petitioner has not withdrawn such payment (and accumulated interest), though she has accepted periodic payments totalling over $70,000 for medical and custodial care over and above the amount deposited by the Fund into the district court registry.[21]

---

[17]Motion to Dismiss with Prejudice, Cleo Allen Butler, *Et Al.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 76-13030 (Civ. D. Ct., Orleans Parish, La., Jan. 14, 1985).

[18]La. Rev. Stat. § 40:1299.44(C)(5); *see* Stuka v. Fleming, 561 So.2d 1371 (La. 1990).

[19]Answer of Sherman A. Bernard, Commissioner of Insurance, State of Louisiana, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Jan. 30, 1985).

[20] Judgment, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., Jan. 28, 1991).

[21]In this Court as below, petitioner's counsel offers that the Fund's payment was and continues to be refused because she "did not wish to jeopardize recovery against the...Fund for independent acts of malpractice by Drs. McKenna, Medley

Drs. Medley, McKenna and Braud then moved the court for summary judgment, observing that by virtue of the $100,000 settlement and the judgment against the Fund for $400,000 (plus interest and costs) and future medical expenses, the plaintiff had been accorded recovery to the full extent permitted by La. Rev. Stat. § 40:1299.42(B)(1) for "any injury to...a patient."[22] Hearing on the defendants' motions was successively deferred by the court pending the Louisiana Supreme Court's rulings in two cases which were expected to address, directly or indirectly, the constitutionality of La. Rev. Stat. § 40:1299.42(B).[23] When neither case ruled specifically ruled on the constitutional validity of the statute, and after the case had been assigned to a judge *ad hoc*, the motions for summary judgment were finally heard in November 1991.

In urging their motions, the defendants observed that the motions turned not on any issue of fact but solely on an issue of law—whether the applicable statutory limitation on recovery of damages was constitutional, a question which had already been answered as against each of the constitutional theories which plaintiffs then advanced. See *Sibley* v. *Board of Supervisors of La. State U.*, 462 So.2d 149 (La. 1985); *Williams* v. *Kushner*, 524 So.2d 191 (La. App. 4th Cir. 1988). Notwithstanding such controlling precedent, in further support of their motions for summary judgment, Drs. Medley, McKenna and Braud sought to independently meet the evidentiary burden posited by *Sibley* v. *Board of Supervisors of La.*

(footnote cont'd)

and Braud." Petition for Writ of Certiorari, at 6. Whatever that may mean, it is clearly settled, as petitioner has elsewhere acknowledged, that petitioner can as a matter of law obtain no additional recovery from the Fund, Williams v. Kushner, 549 So.2d 294 (La. 1989), and petitioner has not on appeal claimed entitlement on any grounds to any further recovery from the Fund.

[22]Motion for Summary Judgment [Drs. Medley and McKenna], Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Feb. 1, 1985); Motion for Summary Judgment [Dr. Braud] (filed Feb. 8, 1985).

[23]*I.e.*, Sibley v. Board of Supervisors of La. State U., 462 So.2d 149, *modified on rehearing*, 477 So.2d 1094 (La. 1985); Williams v. Kushner, 549 So.2d 294 (La. 1989).

State. U,[24] supporting their motion with the entire record of sworn testimony and exhibits admitted into evidence during a five-week evidentiary hearing on the constitutionality of La. Rev. Stat. § 40:1299.42(B)(2) in *Williams* v. *Kushner*.[25] Plaintiff offered no controverting evidence either by opposing affidavits, depositions, answers to interrogatories, admissions or otherwise.

Following argument, the trial court judge advised of his intention to deny the motions for summary judgment on the principal ground, as urged by the plaintiff, that adjudication of the constitutionality of La. Rev. Stat. § 40:1299.42(B) would not be properly presented for decision until trial on the merits had been had and a verdict in excess of the limitation rendered.[26] When judgment to that effect was entered,[27] Drs. Medley, McKenna and Braud applied to the state appellate courts for a remedial writ. Plaintiff's opposition to the application rested on reiteration of the ripeness contention advanced in the trial court and on the alternative argument that the statute was unconstitutional under a variety of theories.

Without commenting on it explicitly, the appellate court implicitly rejected the notion that it was premature for the district court to decide the constitutionality of the statutory limitation, noting that as the plaintiff had already recovered "the maximum amount per-

---

[24]477 So.2d 1094 (La. 1985).

[25]Prince A. Williams, *Etc.* v. Jack Kushner, *Et Al.*, No. 83-1115 (Civ. D. Ct., Orleans Parish, La.,). Therein the same division of the same district court had held that such evidence convincingly established that the questioned statute reflected a legitimate governmental objective and that the classification drawn by the statute was substantially related to the State's objective. It therefore entered judgment declaring that "La. Rev. Stat. 40:1299.42B is constitutional...." Judgment, Prince A. Williams, *Etc.* v. Jack Kushner, *Et Al.*, No. 83-1115 (Civ. D. Ct., Orleans Parish, La., Mar. 30, 1987). On appeal, relying on the same record, as a Federal appeals court later noted, "the Fourth Circuit closely followed *Sibley* in concluding that the cap is valid under the state's equal protection clause." Owens v. United States, 935 F.2d 734, 739 (5th Cir. 1991).

[26]Transcript of Reasons for Judgment, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., Nov. 15, 1991).

[27]Judgment, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., Dec. 13, 1991).

missible under the...Act," as a matter of law no further recovery was allowed under the statute, and plaintiff might defeat judgment "solely on the assertion that the statutory limit...is unconstitutional."[28] Having reference to it's prior decision in *Williams* v. *Kushner*, 524 So.2d 191 (La. App. 4th Cir. 1988), upholding the statute as constitutional, the appellate court summarily reversed the decision of the trial court and ordered that the defendants' motions for summary judgment be granted.[29]

In applying to the Louisiana Supreme Court for writ of review, with barely a passing nod to the prematurity contention she had maintained through the lower courts, plaintiff argued that the appellate court had erred in failing to hold the statutory limitation unconstitutional, advancing a variety of constitutional claims, abandoning some theories earlier pleaded or briefed and adding certain new constitutional theories. And yet another mix of constitutional contentions appeared in the brief on the merits which plaintiff submitted to the state Supreme Court. Respondents did not oppose that court's review of the case.

In an opinion rendered on October 19, 1992, the Supreme Court of Louisiana upheld the constitutionality of La. Rev. Stat. § 401299.42(B), affirming the court of appeal's judgment by holding generally that the statute "does not violate the state or federal constitutions." *Butler* v. *Flint Goodrich Hosp.*, 607 So.2d 517, 521 (La. 1992). Petitioner's subsequent petition for rehearing was denied by that court on November 25, 1992. It is that opinion which Arlene Major, as petitioner herein, now asks the Court to review on certiorari.[30]

---

[28]Slip Op. at 1, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, Nos. 92-C-0062 & 92-C-1032 (La. App. 4th Cir., Feb. 3, 1992).

[29]*Id.* 2.

[30]Respondents' restatement of the case is regrettably compelled by the failure of petitioner's counsel to provide the court with an objective and accurate statement of the case. *See* Petition for Writ of Certiorari 5-9. Petitioner's account of the surgical procedure performed by the respondent physicians and nature and cause of Michelle Butler's condition, *id.* 5, thus, should be understood not as established fact but mere assertions which have no basis in the record below beyond the allegations of plaintiff's pleadings. And as noted more fully in our discussion

ARGUMENT

I. The Issue on Which Petitioner Seeks Review by the Court was not Timely Presented to or Decided by the Supreme Court of Louisiana.

While petitioner suggests that the issue now presented for review is, broadly, whether a limitation on recovery of damages in medical malpractice actions is consistent with the Equal Protection Clause of the 14th Amendment,[31] her petition for review in fact rests on a much more specific argument: that the Americans with Disabilities Act (the ADA) of 1990[32] constitutes "individuals with disabilities" as a "'suspect class' for purposes of equal protection analysis," and the Louisiana statute at issue should thus be subject to "strict scrutiny" because it discriminates against disabled persons. [33] That both branches of this claim are unfounded in law or in logic should be self-evident. What petitioner glosses over, however, is that this claim was articulated for the very first time in her petition for rehearing of the Louisiana Supreme Court's decision . That court, thus, had no occasion to consider and did not decide, explicitly or implicitly, the specific issues which petitioner now urges the Court to decide in the first instance.

To recite, as petitioner does here in a passing effort at compliance with Rule 14(h), that she has asserted federal equal protection as a basis for constitutional challenge of the subject statute,[34] is

---

(footnote cont'd)

of the issues raised by petitioner below, petitioner's counsel misrepresents the nature of the legal claims and theories which she presented to the lower courts. Her statement of the case is thus one employed for argument, not for exposition. As such, the Court should exercise caution before referring to or relying on that statement.

[31] Petition for Certiorari at i.

[32] Pub. L. 101-336, 104 Stat. 328, 42 U.S.C. §§ 12101-12213.

[33] Petition for Certiorari 10.

[34] *See id.* 6-9.

merely to state that through the tortuous course of this litigation she has assailed the statute as "unconstitutional" on virtually every conceivable (and some inconceivable) grounds, among which she has on occasion invoked, usually without differentiation or elucidation, the due process and equal protection clauses of the Federal Constitution.[35] Before all courts below, however, petitioner's attack on La. Rev. Stat. § 40:1299.42(B) has been rooted principally and virtually exclusively in various provisions of the Louisiana Constitution which the statute was said to infringe. The essence of petitioner's arguments to the Louisiana appellate and Supreme Court, thus, was that the statute should be held unconstitutional under the peculiar and unique mode of equal protection analysis which the Louisiana Supreme Court had held applicable to inquiry under the State Constitution's Individual Dignity section in *Sibley* v. *Board of Supervisors of La. State U.*, 477 So.2d 1094 (La. 1985) (on rehearing). In fact, that was the only claim presented by petitioner's counsel, or even discussed, at oral argument of this case before the Louisiana Supreme Court.

Amidst the fog of state constitutional and nonconstitutional claims dispersed by petitioner in an effort to avoid the effect of the statutory limitation on recovery, federal equal protection considerations were at best given short shrift and were never seriously urged. Her brief to the state supreme court, thus, though extending some 26 pages and incorporating at least five distinct theories and claims, federal equal protection appears as but a single-page afterthought.[36] And even then, the argument made was not only insubstantial but very different from that which petitioner seeks to bring before this Court.

Federal and state courts alike, including Louisiana's Supreme Court, have uniformly held that, as a matter of Equal Protection un-

---

[35]*See, e.g.*, Second Supplemental and Amending Petition ¶ 1, at 1-2, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed June 17, 1982).

[36]Original Brief Submitted on Behalf of Plaintiffs-Relators Cleo Allen Butler, Michelle Butler and Arlene Major, at 20, No. 92-CC-0559 (La. Sup. Ct., filed May 20, 1992).

der the United States Constitution,[37] a statutory limitation on medical malpractice damages, involving neither a fundamental right nor a suspect classification, need only be subject to a rational basis analysis, under which various state medical malpractice tort reform measures, including Louisiana's limitation on recovery, have been upheld.[38] Owing no doubt to the consistency and clarity with which the courts have upheld such statutes under federal equal protection scrutiny, petitioner has never asserted that La. Rev. Stat. 40:1299.42(B) is invalid under a rational basis analysis and, in fact, has conceded that the statute would not and could not be successfully challenged under such analysis.

Instead, her sole federal equal protection claim before the Louisiana Supreme Court proposed application of what she characterized as a "'heightened scrutiny' rational basis test,"[39] relying on but a single federal trial court decision, *Coburn* v. *Augustin*, 627 F. Supp. 983 (D. Kan. 1985). What she then conveniently omitted to acknowledge was that the mode of equal protection analysis applied by the trial judge in the aberrant *Coburn* was squarely rejected the following year by the Chief Judge of the same Kansas district court considering challenges to the same provisions of that state's medical malpractice laws. *Ferguson* v. *Garmon*, 643 F. Supp. 335 (D. Kan. 1986) (per O'Connor, Chief Judge). In doing so, Chief Judge O'Connor emphasized that the courts of appeals, including the Circuit encompassing the Kansas district courts, had unanimously "refused to discuss, much less recognize, the height-

---

[37]U.S. Const. amend. 14.

[38]*See, e.g.*, Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Gronne v. Abrams, 793 F.2d 74 (2d Cir. 1986); Montagino v. Canale, 792 F.2d 554 (5th Cir. 1986); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985); Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984); Fitz v. Dolyak, 712 F.2d 330 (8th Cir. 1983); Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982); DiAntonio v. Northampton-Accomack Memorial Hospital, 628 F.2d 287 (4th Cir. 1980); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979); Sibley v. Board of Supervisors of La. State U., 462 So.2d 149, 157, *modified on rehearing*, 477 So.2d 1094 (La. 1985); Bazley v. Tortorich, 397 So.2d 475, 483 (La. 1981).

[39]*See* Original Brief, note 37, *supra*, at 20.

ened form of rational basis test enunciated in *Coburn*." 643 F. Supp. at 240.[40]

As insubstantial as it was, the *Coburn* argument demarked the beginning, and the end, of the federal equal protection claim raised before the Louisiana Supreme Court before it rendered its opinion herein. It is no wonder that the state court did not consider the claim sufficiently serious to warrant discussion in its opinion. Yet, the Louisiana Supreme Court's failure to address that claim is not the basis of petitioner's current petition for reversal of that court's decision. Rather, as previously noted, the instant petition rests on an equal protection claim which made its first appearance in petitioner's application to the Louisiana Supreme Court for rehearing.[41]

As petitioner's equal protection claim was raised for the first time in her application for rehearing addressed to the Louisiana court, it clearly comes too late for this Court to take cognizance of the issue under 28 U.S.C. § 1257, *Hanson* v. *Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945), particularly as it is certain that the Supreme Court of Louisiana did not entertain, consider, address or decide the issue in its opinion or in denying rehearing, without comment. See Appendix to Petition for Certiorari A-43. It could not be more certain, then, that because of petitioner's failure to timely present the equal protection claim she pursues here, the Louisiana courts had no opportunity to construe La. Rev. Stat. § 40:1299.42(B) in light of such federal constitutional challenge and that there was no opportunity for the development of evidence or argument on such issue, leaving the record in this case not only inadequate but necessarily void as concerns petitioner's freshly-minted equal protection claim.

---

[40]The *Ferguson* court also found significant this Court's summary dismissal of an appeal from the California Supreme Court's decision in Fein v. Permanente Medical Group, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985), in which the state supreme court had employed a rational basis analysis in upholding a state limitation on recovery of noneconomic damages in medical malpractice cases.

[41]Application for Rehearing Submitted on Behalf of Plaintiffs-Relators Cleo Allen Butler, Michelle Butler, and Arlene Major, No. 92-CC-0559 (La. Sup. Ct., filed Nov. 1, 1992).

Such circumstances clearly identify this case as one in which the issue now urged on the Court was not properly or adequately presented below. See *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). As the Court has emphasized,

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. *Webb*, 451 U.S. 493, 496-97 (1981); see also *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983); *Beck* v. *Washington*, 369 U.S. 541 (1961).

The instant petition, in sum, does not satisfy the jurisdictional requirements of 28 U.S.C. § 1257. The Court should, and must necessarily, decline its review.

II. Petitioner's Equal Protection Claim Does Not Present a Substantial Federal Question

Petitioner's ADA-based equal protection claim does not, in any event, raise a federal question which might be considered substantial in any sense. For it is based on twin fallacies—that the statutory limitation on recovery of damages challenged here discriminates against disabled persons, and that the Americans with Disabilities Act dictates treatment of disabled persons as a "suspect class" for purposes of federal equal protection analysis.

Since the Louisiana Supreme Court held, in *Sibley* v. *Board of Supervisors of La. State U.*,[42] that, for purposes of analysis under the Louisiana constitution, a statute delimiting the damages recoverable in a personal injury action classifies and disadvantages individuals on the basis of "physical condition,"[43] petitioner has taken

---

[42] 462 So.2d 149, *modified on rehearing*, 477 So.2d 1094 (La. 1985).

[43] 477 So.2d at 1109. Unlike the federal Constitution, the Louisiana Constitution may be read to provide an explicit textual basis for an altered scrutiny of

it as an article of faith that La. Rev. Stat. § 40:1299.42(B) effects a discrimination among medical malpractice plaintiffs based on the degree of their physical disability, the notion being that such a limitation allows full recovery to the less seriously injured while denying full recovery to the catastrophically injured. But the proposition may, at best, be accurate only in a small subset of malpracice cases and would be generally true only if it could be said that tort damages correspond, in a relatively exacting way, to a plaintiff's physical condition or degree of disability. They, of course, do not.

For one thing, whether undertaken by judge or jury, attaching a monetary value to personal injury is a subjective enterprise. As a result of the discretion necessarily accorded the trier of fact, it is not only possible, but not uncommon, for plaintiffs identical in physical condition to receive widely disparate damage awards. Given hypothetically identical injuries, that is, one plaintiff may win a verdict in excess of $500,000 and the other a much lower award. It must also be recognized that there are multiple components of damages recoverable in tort which do not relate to "physical condition" or "disability" as such. In many cases, thus, the major element of compensation claimed and awarded are for non-physical injuries, emotional and mental, or, indeed, for past mental anguish, pain, and the like. A plaintiff with no physical disability whatsoever may nonetheless be entitled to damages for such non-physical, or past physical, losses. Similarly, the quantum of claims for economic losses (lost wages, diminished earning capacity) do relate directly not to physical, but to financial condition. And it should be noted, finally, that the class of plaintiffs who may recover in medical malpractice or other tort claims is not limited to indi-

---

(footnote cont'd)

statutes classifying individuals on the basis of "physical disability," as that constitution provides that "[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, *physical condition*, or political ideas or affiliations." La. Const. 1974, Art. I, § 22 (emphasis supplied). That is not to say, however, that La. Rev. Stat. § 40:1299.42(B) constitutes such a classification. As noted in the text, the Louisiana Supreme Court's conclusion to that effect is analytically flawed. Respondents did not, however, believe it necessary to question *Sibley's* holding in that respect to prevail on the constitutionality of the statute.

viduals who have been the direct victims of professional torts. Spouses and other family members may assert claims for loss of consortium, or for wrongful death. In such instances, again, it certainly could not be said that the damages awarded correspond to the nature or degree of the injury, or the physical condition, of the victim of malpractice. Palpably, then, statutes restricting the maximum damages recoverable do not discriminate against individual "because of" their physical condition or based on the degree of their disability. The line drawn by such statutes—*i.e.*, the classification drawn—is a wholly economic one, distinguishing between claims only by virtue of the level of monetary damages claimed and otherwise recoverable. Only a purposefully myopic view could possibly construe such a statute as one which "discriminates" against disabled persons.

To this analytic fallacy, petitioner adds a legal one—the remarkable proposition that federal equal protection analysis has, in some undefined fashion, been remade by Congressional enactment of the Americans with Disabilities Act—an act which she sees as "a call for heightened scrutiny under the federal scheme of equal protection analysis." Petition for Certiorari 12. Even while conceding that this Court "has previously declined to rule that persons with disabilities display the characteristics of a suspect class," *id.* 11,[44] petitioner nonetheless asks the Court to invent a wholly new equal protection standard. Absolutely no authority for this proposition is cited.[45] And there can be none. For federal equal protection analysis is analysis of what the Equal Protection Clause of the

---

[44]*Citing* City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 445-46 (1985).

[45]Petitioner cites Katzenbach v. Morgan, 384 U.S. 641 (1966) as support for the proposition that "Congress should be granted some leeway...when it expands the reach of the equal protection guarantee of the Fourteenth Amendment." Petitioner for Certiorari 12. But *Katzenbach* certainly did not hold that Congress has the authority to "expand the reach" of the Constitutional Equal Protection guarantee or to dictate to the Court what categories of persons must be considered "suspect" classes for purposes of analysis under that clause. *Katzenbach* held only that, in exercise of the authority granted it under § 5 of the Fourteenth Amendment, Congress is not confined to prohibiting by legislation that which is prohibited by the Fourteenth Amendment itself, as interpreted by the judiciary.

United States Constitution commands, according special protection only to suspect classes identified or fundamental rights "explicitly or implicitly guaranteed by the Constitution" itself. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33-34 (1972). The scope and meaning of that command can neither be added to, subtracted from nor otherwise varied by statute. Yet, to accept petitioner's argument is to accept its preposterous predicate: that the ADA represents a Congressional amendment of the Federal Constitution. To state the proposition is, of course, to demonstrate its inherent absurdity.

Petitioner offers absolutely no authority which even remotely intimates that measuring La. Rev. Stat. § 40:1299.42(B) against the federal equal protection guarantee implicates any test other than the well-established rational basis standard, a standard against which legislative tort reforms in the area of malpractice actions have been consistently upheld by state and federal courts. As a result, this Court itself has consistently refused review of decisions upholding the constitutionality of malpractice damage limitations in the face of equal protection challenges, once in a decision on the merits,[46] and most recently, in denying *certiorari* review of a Missouri Supreme Court decision upholding that state's statutory limitation on malpractice damages. *Adams* v. *Children's Mercy Hospital*, 832 S.W.2d 898 (Mo.) (*en banc*), *cert. denied*, 506 U.S. ___, 113 S.Ct. ___, 121 L.Ed.2d 446 (Nov. 16, 1992).[47] The Court should do the same here, for petitioner offers neither authority nor reason for examining whether the statute here at issue here satisfies federal equal protection guarantees. This case simply does not present a substantial federal question .

---

[46]Fein v. Permanente, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985). The appeal in *Fein* v. *Permanente*, where the California Supreme Court had employed the rational basis test in upholding a limitation on recovery of noneconomic damages in medical malpractice cases, was dismissed by the Courtas one not raising a substantial federal question.

[47]*See also* Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

III. There is No Conflict Among the Courts on the Constitutionality of Limitations on Malpractice Recovery as a Matter of Federal Equal Protection

Louisiana is hardly alone in having enacted tort reform legislation affecting medical malpractice claims or in incorporating a limitation on recovery in such legislation. When the Louisiana Medical Malpractice Act was adopted in the mid-1970s virtually every state and jurisdiction in the nation concurrently enacted some form of remedial legislation. Both then and since then a substantial number of sates have also deemed recovery limitations a reasonable and proper means of ensuring the availability and affordability of health care for their citizens.[48]

---

[48]*See, e.g.*, ALA. CODE §§ 6-5-544, 6-5-547 (Supp. 1991) ($400,000 limitation on noneconomic damages); ALASKA STAT. § 09.17.010 (Supp. 1991) ($500,000 limitation on noneconomic damages); CAL. CIV. CODE § 3333.2 (West Supp. 1992) ($250,000 limitation on noneconomic damages); COLO. REV. STAT. § 13-21-102.5, § 13-64-302 (Supp. 1991) ($1 million limitation on all damages, $250,000 limitation on noneconomic damages); FLA. STAT. ANN. §§ 766.207, .209 (West Supp. 1992) ($350,000 limitation on noneconomic damages); HAW. REV. STAT. § 663-8.7 (1988 & Supp. 1991) ($375,000 limitation on damages for pain and suffering); IDAHO CODE § 60-1603 (1990) ($400,000 limitation on noneconomic damages, annually adjusted); ILL. ANN. STAT. ch. 70 ¶ 101 (Smith-Hurd Supp. 1978) ($500,000 limitation on all damages); IND. CODE ANN. § 16-9.5-2-2 (Burns 1975) ($500,000 limitation on all damages); KAN. STAT. ANN. § 60-3407 (Supp. 1991) ($1 million limitation on all damages, $250,000 limitation on noneconomic damages); KAN. STAT. ANN. § 60-10a02 (Supp. 1991) ($250,000 limitation on noneconomic damages); MD. CTS. & JUD. PRO. CODE ANN. § 11-108 (1989) ($350,000 limitation on noneconomic damages); MASS. GEN. L. ch. 231, § 60H (Supp. 1992) ($500,000 limitation on noneconomic damages); MICH. STAT. ANN. § 24A.1483 (Callaghan Supp. 1991) ($225,000 limitation on noneconomic damages, subject to exceptions and adjustments); MINN. STAT. ANN. § 549.23 (West 1988) ($250,000 limitation on intangible losses); MO. REV. STAT. § 538.210 (1988) ($350,000 limitation on noneconomic damages, annually adjusted for inflation); NEB. REV. STAT. § 44-2825 (1988) ($1 million limitation on all damages); N.H. REV. STAT. § 5084-D (Supp. 1991) ($875,000 limitation on noneconomic damages); N.M. STAT. ANN. § 41-5-6 (1989 & Supp. 1991) ($500,000 limitation on all damages, excepting medical care expenses); N.D. CENT. CODE § 26-40.1-11 (1978) ($300,000 limitation on all damages); OHIO REV. CODE ANN. § 2307.43 (Anderson 1991) ($200,000 limitation on all damages); OKLA. STAT. ANN. tit. 76, § 18 (West 1987) (limits recovery to actual medical expenses incurred, in action brought more than three years from incident); ORE. REV. STAT. § 18.560 (1989) ($500,000 limitation on noneconomic damages); S.D. CODIFIED LAWS ANN. § 21-

Such statutory limitations, or "caps," on damages have admittedly received a mixed reception in the state courts. In a substantial number of cases, both state and federal courts have sustained such statutes against a wide variety of constitutional challenges.[49] In a lesser number of cases, various forms of limitations on damages have been stricken as unconstitutional.[50] State court cases holding

---

(footnote cont'd)

3-11 (1987) ($1 million limitation on all damages); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1992) ($250,000 limitation on all damages, exclusive of medical expenses); UTAH CODE ANN. § 78-14-7.1 (1987) ($250,000 limitation on noneconomic damages); V.I. CODE ANN. tit. 27, § 166B (Supp. 1991) ($250,000 per patient limitation on all damages; $75,000 limitation on noneconomic damages); VA. CODE ANN. § 8.01-581.15 (1984) ($1 million limitation on all damages); WASH. REV. CODE ANN. § 4.56.250 (1988) (formula limitation on noneconomic damages based on life expectancy and average annual wages); W. VA. CODE § 55-7B-8 (Supp. 1991) ($1 million limitation on noneconomic damages); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1991) ($1 million limitation on noneconomic damages, annually adjusted).

[49]*See, e.g.*, Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102 (1992) (jury trial, due process, equal protection); Adams v. Children's Mercy Hospital, 832 S.W.2d 989 (Mo. 1991), *cert. denied*, No. 92-533 (U.S., Nov. 16, 1992) (state and federal equal protection, state open courts provision, trial by jury, due process); Robinson v. Charleston Area Medical Center, Inc., 414 S.E.2d 877 (W. Va. 1991) (equal protection, due process); Etheridge v. Medical Center Hospitals, 237 Va. 87, 376 S.E.2d 525 (1989) (equal protection, jury trial, due process, special legislation); Franklin v. Mazda Motor Corp., 704 F.Supp. 1325 (D. Md. 1989) (jury trial, access to courts); Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (equal protection, jury trial, due process); Rose v. Doctor's Hospital Facilities, 735 S.W.2d 244 (Tex. App. Dallas 1987), *aff'd*, 801 S.W.2d 841 (Tex. 1990) (due process, open courts, equal protection); Fein v. Permanente, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985) (state and federal equal protection, due process); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (federal equal protection); Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980) (due process, equal protection, special legislation, right to jury trial); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977) (special legislation, equal protection); Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (state access to courts, due process, special legislation).

[50]*See, e.g.*, Moore v. Mobile Infirmary Association, 592 So.2d 156 (Ala. 1991) (state right to trial by jury; equal protection though no Alabama constitution equal protection clause); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (substantive due process); University of Miami v. Esharte, 585 So.2d 293 (Fla. App. 3d D. 1991) (same); Condemariam v. University Hospital, 775 P.2d 348

damage caps unconstitutional, however, have done so almost exclusively on grounds of perceived inconsistencies with state constitutional provisions. It does not appear that any such decision has squarely held a statutory limitation on recovery in tort to be proscribed by federal equal protection guarantees, certainly not in the absence of independent state constitutional bases for the decision. And, as previously noted, the federal courts which have addressed equal protection challenges to damage limitations and other medical malpractice reform measures, have been consistent and unanimous in applying the rational basis test to uphold such statutes. See *Boyd* v. *Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989); *Davis* v. *Omitowoju*, 833 F.2d 1155, 1158-59 (3d Cir. 1989); *Lucas* v. *United States*, 807 F.2d 414, 422 (5th Cir. 1986); *Hoffman* v. *United States*, 767 F.2d 1431, 1437 (9th Cir. 1985).[51]

There is no conflict among or between state or federal courts on the constitutionality of limitations on recovery in malpractice actions as a matter of federal equal protection. Indeed, petitioner does not claim that there is any conflict for this Court to resolve. There remains, then, no basis or reason for the Court to review this case. It should, accordingly, decline to do so.

(footnote cont'd)

(Utah 1989) (jury trial, substantive due process); Kansas Malpractice Victims v. Bell, 757 P.2d 251 (Kan. 1988) (jury trial, due process); Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988) (open courts); Reynolds v. Porter, 760 P.2d 816 (Okla. 1988) (special legislation); Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) (access to courts provision; upheld on other grounds); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (state equal protection); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (state equal protection); Wright v. Central DuPage Hospital Association, 63 Ill.2d 313, 347 N.E.2d 736 (Ill. 1976) (equal protection).

[51] *See also* cases cited at note 38, *supra*.

CONCLUSION

For the foregoing reasons, Respondents, Jerome T. Medley, M.D., Warren P. McKenna, Jr., M.D., and Joseph P. Braud, M.D., respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ADAMS AND REESE
By: ROBERT J. CONRAD, JR.*
LAWRENCE L. MCNAMARA
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234

Attorneys for Respondents, Jerome T. Medley, M.D. and Warren P. McKenna, Jr., M.D.

*Counsel of Record

THOMAS, HAYES AND BEAHM
By: HAROLD A. THOMAS*
FRANKLIN D. BEAHM
1000 One Poydras Plaza
639 Loyola Avenue
New Orleans, Louisiana 70113
Telephone: (504) 523-51000

Attorneys for Respondent, Joseph P. Braud, M.D.

*Counsel of Record